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FRATERNIZATION:
TIME FOR A RATIONAL DEPARTMENT OF DEFENSE STANDARD

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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FRATERNIZATION:

TIME FOR A RATIONAL DEPARTMENT OF DEFENSE STANDARD

by Major David S. Jonas

ABSTRACT: This thesis proposes a detailed Department of Defense (DOD) policy for fraternization as a major step towards clarifying this difficult issue for both individual military personnel and commanders. The author provides a brief historical account of the development of the offense of fraternization and the Uniform Code of Military Justice. The thesis examines the current regulations of all five uniformed military services to illustrate and determine the causes of the confusion that surrounds this topic. The thesis also examines analogous civilian rules and international military standards to place the American military regulations in perspective and to highlight the anachronistic character of the current policy. The thesis proposes a normative DOD standard that avoids the internal inconsistencies inherent in the current regulatory schemes which are based primarily on service custom.

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I. INTRODUCTION

The problems of pregnancy, single-parents, and dual service couples were made possible largely by the erosion of the age-old ban on fraternization between the ranks. To be sure, the American military has been moving toward greater and greater egalitarianism for some time, but nothing has done more to cheapen rank and diminish respect for authority than cute little female lieutenants and privates. Military customs and regulations are no match for the forces that draw men and women together in pairs without regard for differences in pay grade. Cupid mocks Mars. Lust and love laugh in the face of martial pomp and the pretensions of power.¹

A. Hypothetical

The following hypothetical highlights some of the typical problems which arise in a paradigm fraternization case.

Dateline: Saudi Arabia, 1 April 1991. You are the public affairs officer for the U.S. Central Command appearing on a Cable News Network (CNN) interview regarding a fraternization prosecution in the Persian Gulf. A U.S. Marine Corps First Lieutenant has been dating a female Navy dental technician. They are engaged and the female is pregnant. The two are attached to separate units, and have never worked together. The civilian defense attorney representing the Lieutenant is present and makes the following comments: "This is a moral outrage. Both parties are young, single, attractive Americans. They are here pursuant to orders, fighting for their country. Both have perfect records. They aren't in the same unit or service. All their activities were conducted in private. What about their rights to privacy and freedom of association? Those are the very Constitutional rights they are risking their lives to defend.² All they did was fall in love. And for this, the Marine Corps wants to brand them criminals and send them to jail." The moderator turns to you and says, "How do you respond?"

The legal ramifications to the arguments raised by defense counsel are not susceptible to simple analysis. This thesis explores these and similar issues.

B. Background

Anyone who has served in the military in the last decade is aware of the concept of fraternization. Unfortunately, genuine understanding of this concept lags far behind this general familiarity. When asked to define fraternization, most military personnel focus primarily upon officer-enlisted dating and sexual relationships. Those types of relationships are the primary focus of this thesis, yet the actual definition encompasses far more.

Surprisingly little has been written on fraternization, given the lack of genuine understanding and the constant debate and confusion that it spawns. Most military personnel agree that the frequency of fraternization is on the rise. One of the most significant factors responsible for increased fraternization is the influx of women into the military since World War II, an influx which escalated rapidly in the 1970s.¹ This increase has resulted in today's military, with over 221,000 women on active duty--roughly 10% of our total force.⁴ If nothing else, this explains increased opportunity for fraternization.

With the end of the draft, the institution of a volunteer military has ensured that the American military mirrors society.

American culture is essentially egalitarian--a far cry from the authoritarian nature of the military. The absence of real class distinctions in the civilian world highlights the military officer/enlisted distinction. Americans do not recognize class distinctions,⁴ and accept them only if they are rationally related to a legitimate purpose. This is one reason for the conceptual and practical problems surrounding the fraternization regulations, especially in the context of disposition by criminal prosecutions. The failure to grapple adequately with this contemporary issue results in radically different policies and practices and leaves virtually all military personnel in a quandary.

C. Purpose

This thesis examines the fraternization regulations of all five branches of the uniformed military services⁵ from a functional perspective: what are the purposes for the regulations, and are the regulations fulfilling these goals? The thesis first places fraternization in a brief historical context, then examines the reasons for the creation of the Uniform Code of Military Justice (UCMJ),⁷ its legislative history, and emphasis on uniformity. This thesis shows how the current concept of fraternization is virtually unrecognizable from its ancestry. The thesis then examines the current punitive article on

fraternization in detail and discusses the concepts of fraternization in the civilian sector and in allied military forces to provide standards against which to measure the American military regulations. The analysis of individual regulations of the services culminates in a functional analysis specifically addressing whether the regulations are accomplishing their intended purpose. Finally, this thesis examines attempts to revise fraternization policy, and concludes with proposing a Department of Defense (DOD) "purple⁸ standard" for fraternization.

Four out of five services revised their regulations in the last two years. Fraternization is a subject of heated debate, and there have been legislative attempts to create a DOD regulation. The services are united in their opposition to a DOD policy,⁹ presumably because no unit commander likes to be told how to run his outfit, regardless of who is doing the telling. Alternatively, mere bureaucratic inertia, or hostility to change, may be responsible.

A majority of the services stresses that fraternization is a gender-neutral¹⁰ concept, which is not objectionable as a policy matter, but modern enforcement focuses almost exclusively on opposite sex dating and sexual relationships.¹¹ The thesis will therefore focus primarily on mutually consensual, non-deviate,

private sexual relations.¹² These qualifications are necessary to segregate fraternization from assault, rape, sexual harassment, and a host of other criminal offenses.¹³

II. HISTORY OF FRATERNIZATION

A. Inception and Early Development--Roman Era

Fraternization has steadily evolved since its inception. To quote Justice Frankfurter, "Wisdom, like good wine, requires maturing."¹⁴ Fraternization appears to have originated in the Roman era.¹⁵ References to the custom against fraternization appear throughout writings on military history and military law.¹⁶ The ancient Romans have the first recorded regulations regarding associations of personnel of different rank within their military.¹⁷

B. European and British Concepts of Fraternization

The origin of the current policy on fraternization stems from the class distinction between nobles and peasants in the European Middle Ages.¹⁸ The military concept of social and class distinctions in the feudal era, as in Roman times, presented a microcosm of social mores. Battles were fought by knights who returned to their castles upon completion of wars. Officership was merely a part-time aspect of aristocratic existence.¹⁹ The Code of Articles of King Gustavus Adolphus of Sweden prohibited close relationships between officers and common soldiers, circa 1621.²⁰ A huge social chasm existed between the officer and the soldier, even when the medieval feudal economy stalled, and capitalism arose in its place.²¹ As this occurred, knights gave

way to mercenary armies--"soldiers organized and led by nobility and financed by capitalists."²² Through the standing army the nobility found employment and leadership positions by virtue of officership.²³ They perpetuated the concepts of honor and superiority as prerogatives based on their "high born estate, which could not be shared by inferiors."²⁴ Enlisted soldiers were recruited from the lowest elements of society and were often beggars and criminals. While the vivid demarcations between nobles and peasants terminated due to the Napoleonic emphasis on skill, class-based distinctions remained.²⁵ Discipline was harsh for enlisted men, in accordance with Frederick the Great's maxim that men must fear their officers more than the enemy.²⁶

The British were quite adept at keeping those concepts alive. At the time of America's birth, the British Articles of War, while not specifically alluding to fraternization, had provisions prohibiting both conduct unbecoming an officer and a gentleman²⁷ and conduct prejudicial to good order and military discipline.²⁸ Fraternization, as currently understood, was prosecuted under these articles.²⁹

Many fraternization type cases were tried in the early 1800s by the British.³⁰ These included fighting about women of bad character,³¹ dressing in a sergeant's jacket and associating with privates in the guardroom,³² "sitting in company and

associating with" a private in an officer's barracks room,³³ messing with noncommissioned officers,³⁴ eating and drinking with soldiers in the barracks,³⁵ and playing billiards with a soldier in a public tavern.³⁶ It is noteworthy that merely associating or mingling among different ranks was the common theme in each of the listed offenses.³⁷

At this time the British were the enemy. Colonial America abhorred their aristocratic ways. Defiantly, the Declaration of Independence stated, "All men are created equal."³⁸ How unusual then, that their Articles of War were adopted nearly verbatim as our military code.³⁹ A rather obvious conflict was ingrained: an artificially aristocratic caste of officers had been set up to lead an armed populace of free independent men.⁴⁰

C. Evolution of the American Concept of Fraternization

Not surprisingly, since American punitive articles were identical, American cases also mirrored the British experience.⁴¹ Nearly all of the cases involved drunkenness in public places,⁴² and many, from a contemporary "enlightened" perspective, appear humorous. These cases included inviting enlisted men to an officer's quarters to drink,⁴³ accompanying noncommissioned officers of his company to "visit and drink whiskey at a low hovel kept by Irish and Negro women, thereby degrading himself in the opinion of the men,"⁴⁴ and, a true classic, "a lieutenant, while

in command of the guard became drunk and had sexual intercourse with a Negro, or colored woman, in the presence of his guard, and did remain on said Negro, or colored woman, thirty minutes or more until [the guard] made him get off."⁴⁵ Although some of this conduct might be prosecuted today, many cases prosecuted then would not be prosecuted now.⁴⁶ In spite of this, the custom held on and dug in deeper. Officers and enlisted men were separated by a solid class boundary.⁴⁷

D. Fraternization Based Upon the Need for Good Order and Discipline; The Death Knell of the Social/Class-Based Fraternization Justification.

World War II confounded the entire issue, particularly due to women entering the service.⁴⁸ This presented an opportunity for a whole new type of fraternization.⁴⁹ The different handling of fraternization issues that were a normal consequence of the presence of women and men together in the services provided a further impetus to the call for uniformity in military justice. This was a confusing time to be in the military. Enlisted women in the Army were punished for "dating Naval or Allied officers who were not punishable."⁵⁰ Still, the consensus was that dating and socializing between officers and enlisted personnel did not adversely affect morale and discipline.⁵¹ Even after the war the courts hesitated to regulate private heterosexual fornication

absent aggravating factors.¹² Nonetheless, between men, rules against fraternization were based on the customary notion that "familiarity breeds contempt."¹³

Imbibing alcoholic beverages with enlisted men, in public or private, resulted in numerous courts-martial. For example, a pilot was convicted of fraternizing with his enlisted copilot by drinking liquor at a bar with him, and this occurred in 1944.¹⁴ There was also a divergence of opinion within Army cases which concluded that drinking liquor in the company of enlisted men was conduct prejudicial to good order and discipline, though not conduct unbecoming an officer and a gentleman.¹⁵

The case of United States v. Bunker¹⁶ stands for the same proposition as Field, supra, and its progeny, but it also contains the first reference to the term "fraternization." Bunker completed the shift in justification for fraternization regulations from maintaining social class distinctions to the need for discipline and order. Rather than rely upon class distinctions, courts began to lean heavily upon the "custom of the service."¹⁷ From this point on, routine fraternization convictions were upheld as conduct prejudicial to good order and discipline rather than conduct unbecoming an officer and a gentleman, unless there were additional aggravating circumstances.¹⁸ But many senior officers, including General

Eisenhower, disagreed with such distinctions, especially in the context of mixed-gender relationships.⁵⁹

The case of United States v. Patterson,⁶⁰ illustrates this point. In Patterson, a lieutenant was convicted for fraternizing socially "with enlisted men in a public hotel and country club." The court stated that social fraternization between officers and enlisted personnel is "prohibited by military custom and not by any specific provision of the articles of war. The basis of the custom is military discipline. It is not a question of social equality" (emphasis added).⁶¹ In United States v. Penick,⁶² an Army Air Corps second lieutenant was convicted of fraternizing and socially associating with a staff sergeant and a sergeant, by "talking, drinking, and playing darts with them in a public place."⁶³ It is difficult to see how military discipline was prejudiced by such innocuous conduct.⁶⁴ The civilian press reacted with characteristic contempt⁶⁵ to this type of reasoning.

But other factors were, and are still at work rendering such distinctions less palatable. The technological revolution, still accelerating, has promoted the "dehierarchization"⁶⁶ of the military. As linear operations have been replaced by small groups, frequently acting independently, the need for initiative has increased in importance at the expense of obedience. Rank has

also lost significance, for the expert enjoys a certain "functional autonomy"⁶⁷ in that he may be ordered as to where to report and why, but not as to how he chooses to exercise his skill. Moreover, officers and enlisted men are recruited from similar social classes, and enlisted men now feel justified in criticizing their officers, and even expect to be consulted on decisions which affect them.⁶⁸

E. Article 134 Fraternization

Even amid the growing number of incidents of fraternization, and the concomitant regulations and court decisions, only one constant remained: confusion. The 1984 Manual for Courts-Martial included a specific criminal offense of fraternization under Article 134 for the first time.⁶⁹ It was appropriately placed under Article 134, the "General Article," which encompasses "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." Prior to discussing the article on fraternization, it is critical to analyze the general guidance applicable to all Article 134 offenses.⁷⁰

(1) Analysis of Article 134

While broad in its application, the guidance for the general article is reasonably specific by its terms. Courts have consistently upheld its validity against frequent void for

vagueness attacks.⁷¹ The most important language of the regulation is the requirement that acts be "directly" prejudicial to good order and discipline. The statement that the act cannot be "prejudicial only in a remote sense" clarifies this. Thus, socializing within the chain of command would qualify, but beyond that, the impact, if any, seems quite intangible and insubstantial. Interestingly, courts rarely confront this issue, nor is it frequently raised.

For these types of fraternization, courts rely on a breach of the custom of the service. Article 134's language should give pause to many prosecutors. For example, the "custom prong" of Article 134 requires that the custom "arise out of long established practices." One wonders if a service may "bootstrap" a custom into existence through promulgation of regulations. It would seem to radically depart from this standard to overhaul regulations in spite of the actual custom. This aspect of Article 134 is unclear. While it makes sense to assert that "no custom may be contrary to existing law or regulation," what happens if the regulation is contrary to existing custom? Must the custom change to fit the regulation, or is the regulation void? The statement that "many customs of the service are now set forth in regulations of the various armed forces," does not clarify whether a regulation may establish a custom, or whether the "custom" as

stated in the regulation must have any basis in reality. As this thesis illustrates, custom is the "soft" point of commonality in the service regulations; so soft that the regulations can rarely be fixed for definition or application. The resolution of this issue turns on whether one views the law in the abstract as descriptive, i.e., something that reflects social practices, or as normative and instrumental, i.e., a method for forcing people to conform their conduct to the requirements of the law regardless of what it otherwise would be.

Finally, one must question whether there is a need to prosecute violations of custom at all. No other violation of a custom is dealt with as a criminal offense.⁷² The following excerpt is from a recent fraternization case, and illustrates that the courts are hard pressed to deal with this issue:⁷³

Customs differ among the armed services. Coast Guard customs and regulations still allow the wearing of a beard, as did the Navy until recently; but the other services require their members to be clean-shaven. In the Army, an officer still may not protect himself from rain with an umbrella; but in the Air Force this custom has been abandoned. Indeed, the Air Force--the most recently created of the armed services--has never honored some of the customs recognized in the senior services; and perhaps because both officers and airmen at one time served together in small flight crews, the barriers placed by custom between officers and enlisted persons have probably always been lower in that service than in others.⁷⁴

The elements of the offense of fraternization⁷⁵ make clear that both the custom and the prejudice to good order and

discipline prongs must be satisfied to prove fraternization. The first element, however, requires the accused to be a commissioned or warrant officer. Presumably, this requirement reflects the custom of fraternization as essentially an officer-enlisted offense. Yet it is now accepted that fraternization may occur between officers and between enlisted members.⁷⁶ Since the Manual was effective in 1984, one wonders what a "long standing" custom really means.⁷⁷

Different definitions of fraternization appear in virtually every service,⁷⁸ and in many cases within the services. The Manual states that the critical point is violation of a service custom. Each case must be evaluated on its own merits, since "not all contact or association between officers and enlisted persons is an offense." The Manual offers three factors to evaluate an allegation of fraternization:

- (1) whether the conduct compromised the chain of command
- (2) whether the conduct resulted in an appearance of partiality [and]
- (3) whether good order, discipline, authority, or morale were undermined.

These factors serve as an adequate starting point, but the Manual does not state whether all three factors must be in issue or whether one will suffice. Ultimately, there must be some tangible prejudice to good order and discipline, and the respect of enlisted persons for officers must be somehow diminished. It

is unclear whether this pertains only to the specific officer concerned, or to the officer corps as a whole. The general philosophical issue is whether the Manual seeks general or specific deterrence.⁷⁹

Interestingly, Article 134 goes on to countenance specific regulations which may be dealt with under Article 92, which prohibit officer-officer or enlisted-enlisted fraternization. One wonders why the sample specification remained as a purely officer-enlisted offense.⁸⁰

III. HISTORY OF THE UNIFORM CODE OF MILITARY JUSTICE

A. Purpose of the UCMJ

Legislation and regulations historically spring from confusion and disparate application in a given area. The impetus is usually a public outcry for change. Such was the situation in the aftermath of World War II.⁸¹ Conditions were ripe for significant changes in the administration of military justice.⁸² The first UCMJ reflected a monumental effort to overhaul and modernize military justice.⁸³

As demobilization progressed, the Secretary of War requested members to serve on the War Department Advisory Committee.⁸⁴ Concurrently, the House of Representatives gave its input on the Army's judicial system.⁸⁵ This resulted in the introduction of bills to revise the Army court-martial systems in both the House and Senate.⁸⁶

Contemporaneously, the Secretary of the Navy was promoting an overhaul of the Naval justice system.⁸⁷ One of his committees recommended a complete revision of the Articles for the Government of the Navy.⁸⁸ Other committees recommended numerous changes, and subsequently implementing legislation was introduced.⁸⁹ The National Security Act of 1947⁹⁰ created the Department of the Air Force. Secretary of Defense James Forrestal saw that, with the gross disparities between the Army and Navy systems of justice,⁹¹

the addition of a third system for the Air Force would make coherent military justice a fantasy. The Navy was especially concerned that the new Code's general article might not countenance "custom of the service" offenses.⁹² Forrestal's goal was maximum justice for all servicemen.⁹³ Thus, he appointed yet another committee to draft a "uniform code of military justice"⁹⁴ with equal application to all services. After lengthy consideration, the committee formulated bills which ultimately became the first Uniform Code of Military Justice.⁹⁵ The purpose of a single code for all services was uniformity,⁹⁶ which simply did not exist prior to the UCMJ. Article 1 of the UCMJ, paragraph (5), states that "'military' refers to any or all of the armed forces" (emphasis added).⁹⁷

B. Uniformity of Treatment and Application

The UCMJ is uniform in its coverage of the military person⁹⁸ wherever they are stationed.⁹⁹ The purpose of uniformity was to promote equity and fairness among the services, not only in application but in perception.¹⁰⁰ The UCMJ stopped the chaotic system of different codes, and uniformity prevailed.¹⁰¹ The UCMJ allowed the services some leeway in application when based on a clear difference in mission. The UCMJ's drafters would never have countenanced the disparate results currently produced by divergent service fraternization

policies. They would also undoubtedly have recognized the need for the code to change with the times.¹⁰²

The lesson of the UCMJ is that military justice cannot remain static during changing times. In a nation of citizen-soldiers, military law must approximate civilian justice enough to be recognizable. The UCMJ represented a compromise between the push from civilian desires for military justice to emulate the fairness of civilian justice, and the pull of the military desire to maintain as much command discretion and control as possible.¹⁰³ Much of the fairness ultimately attained by the UCMJ is attributable to uniformity.

IV. A CIVILIAN PERSPECTIVE ON FRATERNIZATION

Many civilians have little respect for military justice.¹⁰⁴ Yet, the concept of fraternization is not foreign to civilians,¹⁰⁵ who share the military's difficulty in grappling with this perplexing issue.¹⁰⁶ Some incidents of corporate fraternization have attracted national media attention.¹⁰⁷ Articles frequently describe lurid tales of patients suing their psychiatrists for sexual relationships foisted upon them.¹⁰⁸ Similar stories and cases abound concerning attorney-client, faculty-student,¹⁰⁹ and employer-employee¹¹⁰ relationships. Many professional organizations, corporations, and universities regulate such relationships. Organized religions regulate sexual conduct between clergymen and their congregants.¹¹¹ While recognized as a problem, it is not a criminal offense.¹¹²

The threshold question in the civilian sector is whether the corporation/university/professional association has the legal or moral right to forbid romance between individuals within the organizational structure. But once a civilian entity decides to adopt an anti-fraternization policy,¹¹³ experts recommend that "the policy should be narrowly drawn to accomplish legitimate management concerns."¹¹⁴ This concern for managerial authority equates to the military's prohibition on fraternization within the chain of command of a unit. That is precisely the civilian

focus--those who work together in the same department, office space, or section. Organizations recognize that those who work closely on the same projects spend time together and begin to see things the same way.¹¹⁵ Yet, it is widely recognized that romance in the workplace is counterproductive.¹¹⁶ As the number of women in the workforce and in the military increases, the opportunity for, and the overall number of romantic interludes (and problems) will increase.¹¹⁷

While the military is a society apart from the corporate/civilian world, it is illuminating to see how civilians deal with this phenomenon. For example, the view of faculty-student relations as "fundamentally asymmetric"¹¹⁸ illustrates that the civilian concern is nearly identical to the military's. But civilians look at what the military is doing also. Some of the military's most embarrassing publicity stems from fraternization cases.¹¹⁹ Recently, the military fraternization policy was lampooned in the "Doonesbury" comic strip.¹²⁰ Many commanders attempt to keep fraternization cases quiet, even when they result in courts-martial. This reflects an instinctive recognition that civilians abhor punishing someone for a simple romance. Put in simple terms, sending someone to jail for a mutually consensual, non-deviate, private sexual relationship is rather medieval in this day and age.

As long as men and women work together in organizational confines, romance and sex will occur. No legislation or regulation will change that. Civilian organizations wrestle with and accept this fact. Colleges and universities now regulate student/faculty sexual or romantic relationships.¹²¹ These regulations typically deal with mutually consensual relationships, and treat non-consensual conduct such as sexual harassment¹²² elsewhere. Consent¹²³ is not usually a defense,¹²⁴ both because of the "supervisory, educational, or advisory responsibility for that student" and the asymmetric balance of power involved. But once a student is no longer under a professor's academic cognizance, they may date. The required nexus is analogous to the military's chain of command.¹²⁵ Interestingly, civilian concerns rarely focus on the issue of loss of respect for the superior, which is the principal focus of the military.

If any profession has been hard hit by allegations and revelations of sexual escapades within its ranks, it is psychiatry. The American Psychiatric Association (APA) has established that sexual relations between psychiatrists and their patients are always unethical.¹²⁶ But other more nebulous areas, such as relations with psychiatrists' students, employees, co-workers, and colleagues arise. In deciding whether ethical issues are involved, the APA looks at inequalities in status and power,

whether the inequalities are exploited, and whether the fraternization causes harm.¹²⁷ The footnoted extract details the great potential for abuse and shows that the line between consensual and non-consensual relationships can be hazy. This is all the more reason for the military to retain the offense of fraternization, but beyond the chain of command, prosecutions for fraternization are unjustified. Indeed, once the working relationship or supervisory issues disappear, fraternization issues are substantially diminished.

The American Psychological Association,¹²⁸ and the American Board of Examiners in Clinical Social Work,¹²⁹ also regulate these relationships. After determining that frequent sexual involvement existed between lawyers and their clients,¹³⁰ the California legislature ordered the state bar to regulate this area. The proposed "sex with clients" rule prevents California lawyers from taking advantage of their clients--"at least physically."¹³¹ Marriage and family therapists have similar regulations.¹³²

The civilian view on marriage resulting from fraternization is that, "We are apt to engage in revisionist history and declare the relationships nonexploitive."¹³³ This is remarkably similar to the way the military treats "mixed" marriages.¹³⁴

Civilians have only begun to scratch the surface of this complex issue.¹¹⁵ Yet their perspective and approach is undeniably instructive. The military learned from the history of the UCMJ that it is unwise to stray too far from civilian standards. Thus, while considering civilian handling of this problem, the military should also pay attention to their perspective on the military's policy.

On balance, the military's attitude towards fraternization seems unnecessary. Two issues are involved. First, should the armed services continue their policy of strictly discouraging officer-enlisted social contact? Second, should criminal sanctions be used to enforce the prohibition?

Little evidence suggests that the present social caste system enhances military performance. Other armed forces operate with looser control and no notable loss of effectiveness. Combat conditions typically reduce the barriers between enlisted men and junior officers. . . . Many current enlistees share the same social, intellectual, and cultural values of their officers. Discouraging normal social contacts arising from these mutual interests infringes on the freedom of both parties. Even if the military determines to maintain its attitude toward fraternization, the retention of criminal sanctions is indefensible.¹¹⁶

Thus, while many civilians have a positive view of military justice,¹¹⁷ the current fraternization regulations are increasingly coming under fire, to the extent of being compared to racial separation statutes.¹¹⁸ The Department of Defense must pick up on these cues and act decisively, now.

V. AN INTERNATIONAL MILITARY PERSPECTIVE ON FRATERNIZATION

The regulations of other countries' military services provide yet another invaluable perspective on fraternization.¹³⁹

A. Canadian Armed Forces¹⁴⁰

The Canadian Armed forces published formal fraternization regulations for the first time in 1988. Most personnel applauded the regulation, but there was some dissent.¹⁴¹ A major increase in the number of women in the Canadian Forces, as a result of the passage of the Human Rights Act,¹⁴² provided the impetus for the regulation. Due to the close relations of the Canadian and American military services and their geographical proximity, the Canadians carefully studied American fraternization regulations prior to formulating their own. The Canadians drafted a regulation based on the Navy's definition of fraternization, because of its "greater emphasis on the sexual connotations."¹⁴³ Dispassionately analyzing American regulations, the Canadians adopted this recommendation: "Rather than three or four separate command promulgated policies/guidelines, the promulgation of one which has forces wide applicability is strongly recommended."¹⁴⁴ Correspondence from the highest levels of command concurred. The drafters acknowledged that classic fraternization (prior to the entry of women into the forces) was really not the problem. The

major concerns were male-female relationships, and thus the title of the regulation, "Mixed-Gender Relationships."¹⁴⁵

Then Lieutenant General A. J. G. D. de Chastelain, Assistant Deputy Minister of Personnel and now the Canadian Chief of Defense Staff,¹⁴⁶ played an instrumental role in formulating the final regulation. His thoughts are most instructive:

In drafting the CFAO, we were cognizant of the delicate balance between providing firm policy and guidance, and appearing out of step with today's social norms. I believe that we have struck a balance that is workable and acceptable.¹⁴⁷

The regulation is applied exactly as it is written,¹⁴⁸ without nuance or hidden meaning. Individual services are free to promulgate their own mixed-gender relationship orders consistent with the CFAO. The Canadians regulate relations between cadets and between cadets and noncommissioned officers.¹⁴⁹ Only trainer-trainee type offenses are actually prosecuted, and this is rare. The Canadian fraternization policy most closely resembles the Coast Guard's.¹⁵⁰ It is an extremely liberal policy, certainly by U.S. Navy and Marine Corps standards. Yet, it exemplifies a common sense approach, which obviously considered civilian views on the matter.¹⁵¹

1. Analysis of the Regulation

In the Canadian Forces there is no regulatory obstacle to a captain dating an enlisted woman outside the chain of command.

The only "problems" they perceive with this type of relationship is the inconvenience to the parties concerned since the enlisted woman may not join her beau at the officer's mess, and vice-versa.

There are several interesting aspects to the Canadian regulations. First, they apply to relationships with members of foreign military forces, since Canadian forces work so frequently with foreign military units. Second, the relationship must be "in public" before it may be subject to regulation. Third, and significantly from a fairness aspect, the regulation applies to dating as well as marriage. Finally, if a relationship is formed while Canadian Forces (CF) members serve together, they will normally be allowed to complete the assignment unless aggravating circumstances develop.¹³²

There are no obscure references to the countless ways these relationships can manifest themselves, as seen in American regulations and caselaw. The ways fraternization manifests itself are far from infinite. The CF regulation sums up the issues of public conduct rather well. The regulation does not even mention sexual relations, since, if conducted in private, they are not covered by the order. Thus it is a fair, workable policy which places a high degree of trust in the ability of servicemembers to utilize good judgment, while recognizing that "hormones are hormones."¹³³ Mixed-gender relationships will occur, at an

increasing rate, regardless of what regulations say. But if soldiers know that only the people in their own chain of command are off limits, they are likely to acknowledge the wisdom and utility of that policy and look elsewhere. An outright prohibition on mixed-gender relationships is unrealistic given human nature, and merely encourages widespread rule breaking and hypocrisy.

B. Kenyan Armed Forces¹⁴

Although there is no specific, written regulation prohibiting fraternization in the Kenyan forces, there is an unwritten policy that no male member of the military may date anyone from the Women's Service Corps. This is a long standing policy and has served them well. Although Kenyan women serve in all branches, there is a separate Women's Service Corps under Army cognizance. To enter the service, women must be single, with no children, and sign a contract agreeing to remain this way. Pregnancy is a breach of contract and provides grounds for separation. A Kenyan commission looked into this rule due to objections based upon freedom of association, but the military view prevailed because these rights are voluntarily sacrificed by joining the service. This has never been challenged in court.

When fraternization occurs, it can be prosecuted under an article similar to the American Article 134. Normally, the

individual concerned is administratively discharged; no one has ever gone before a court-martial charged with fraternization. Fraternization is not a major problem, for when it occurs, the woman will typically leave the service voluntarily and is then free to date or marry the man. Since no one may date anyone else on active duty, those who date must date civilians. This is unique, and fair in the sense that it obviates the need to draw lines based on rank. It is feasible in Kenya due to the comparatively small number of women in the military. The policy is announced to all personnel at accession and at legal training, which occurs every three months in all units. As in America, when fraternization is discovered, the individual is first counseled prior to any adverse action. Thus, there is a preference for leniency. Since the policy is so well known, crystal clear, and all encompassing, it has survived the few challenges that have arisen. By establishing this issue as one of contract law, the Kenyans have neatly sidestepped a potentially troublesome problem.

C. Australian Army¹³

There is no written regulation on fraternization pertaining to members of the Regular Army, because fraternization is not a significant problem in the Australian Forces. The only specific regulations which address this issue are at basic training installations and schools; instructor-recruit relations are

prohibited. Interestingly, at the Royal Military College the fraternization policy pertains to cadets only, and prohibits relations among them while in training.

Officer-enlisted marriages are not prohibited but are not common, because restrictions apply at messes and this can obviously lead to complications. Where favoritism and partiality are shown within the chain of command, fraternization could be prosecuted under a general article similar to the American Article 134. When cases of fraternization arise, administrative sanctions may be employed, such as a discharge, censure, or transfer. A common sense approach to this issue is utilized and members are trusted to exercise discretion.

Given the similarities between Australian and American societies, the obvious question is why fraternization is a problem in the American military and not nearly as troublesome in the Australian military. The response was, "Because you [Americans] seem to have a need to have a rule for everything." That comment is most illuminating. The Australian military does not regulate the personal conduct of its members to the extent that the American military does. If all else fails, the American military may consider this successful approach--trusting officers and noncommissioned officers to act responsibly.

D. Royal Netherlands Army¹³⁶

The Royal Netherlands Army has no written policy on fraternization. Their soldiers are expected to act in a strictly professional manner while on duty and in uniform; yet what a soldier does off-duty, and off-base, is his own business, for they perceive no benefit in meddling in purely private affairs. Therefore, there is no problem with officers dating enlisted personnel, officer-officer, or enlisted-enlisted relationships. There are no criminal sanctions available for fraternization.¹³⁷

Public displays of affection, on base, are considered unprofessional. In cases of fraternization where favoritism is being shown, administrative sanctions including adverse reports or transfers may be utilized.

E. Turkish Armed Forces¹³⁸

Fraternization is not an issue in the Turkish military, as there are very few women in the armed forces. Nonetheless, regulations govern official relationships between the four classes of Turkish military personnel: general officers, officers, noncommissioned officers, and enlisted personnel.¹³⁹ Primarily, these regulations govern the conduct between personnel on duty only. For example, the regulations stipulate that a noncommissioned officer cannot enter the general's mess. There is no prohibition on male-female relationships off-duty, nor is there

any criminal sanction available for violation of any of these rules. Administrative sanctions are deemed adequate.

F. Royal Thailand Armed Forces¹⁶⁰

Thailand has no formal, written rules regarding fraternization. Custom provides the only guidance, yet custom is adequate guidance since this is not a criminal issue. Fraternization is not a major problem in the Thai forces. Customary rules of professionalism dictate that no outward manifestations of romance should be visible between any personnel when on base, on duty, and in uniform. Certain exceptions to this general rule exist for relatives and married couples. Once off duty, off base, and out of uniform, fraternization is not an issue, and personnel may freely associate with whom they please. Therefore, a captain may marry or date a corporal.

G. British Army¹⁶¹

One would guess that the British have a strict fraternization policy since American law was principally derived from theirs.¹⁶² But this is not so. There are rules dealing with customs, courtesies, and separations by rank at clubs, messes, and quarters. Additionally, there are usually local orders dealing with men entering women's quarters and vice-versa. These, however, are minor disciplinary matters and do not specifically pertain to fraternization. Army General and

Administrative Instruction, volume 2, deals with, inter alia, "misconduct by officers" but does not specifically address fraternization. Fraternization could conceivably constitute an offense under the Army Act general provision (identical to Article 134) but the offense would have to be strictly proven and Major Conway was not aware of any such attempts to prosecute fraternization. A mixed gender relationship between two soldiers which is kept off base and out of uniform, would not, without further aggravation, constitute an offense.

2. Analysis of International Military Policies on Fraternization

It is painfully obvious that the American military goes to great lengths to regulate fraternization, relative to our allies and civilians. Canada is the only notable exception, having recently promulgated very unobtrusive fraternization regulations. The most troubling revelation from this comparison is the American compulsion to regulate every aspect of military personnel's lives. The Army, in particular, is notorious for having shelf after shelf of regulations. This distinction is hardly favorable since it is attained through unnecessarily intrusive regulations. Allied military organizations are effective with their minimalist approach to fraternization.¹⁶¹ The American military should get in step.

VI. THE CURRENT FRATERNIZATION REGULATIONS OF THE MILITARY SERVICES¹⁶⁴

A. This section will compare and contrast the current regulations of the Navy, Marines, Army, Air Force, and Coast Guard. For ease of reference, all pertinent provisions of the actual regulations are provided in Appendix D.

1. U.S. Navy policy. The Navy has published one of the broadest regulations.¹⁶⁵ This regulation is intended to be specific in what has been a very nebulous area, in order to put all hands on notice of what is expected of them.

a. Analysis. The inherent ambiguity of fraternization shines through this bold attempt to define it. For example, what does "unduly familiar" mean?¹⁶⁶ This vague definition brings to mind Justice Stewart who said he could not define pornography, "but I know it when I see it."¹⁶⁷ Does unduly familiar mean eating lunch together at the chow hall? Having a drink at an off-base bar or at an on-base all-hands club?¹⁶⁸ Is it playing tennis together on a weekend? Is it addressing one another on a first name basis? These questions are far from rhetorical;¹⁶⁹ they are difficult and fact specific, as most cases of fraternization are.¹⁷⁰ One reason to keep fraternization policies ambiguous is to permit commanders greater flexibility. On a continuum from precise to ambiguous

regulations, the fraternization regulations of the Navy and other services, except the Coast Guard, are the most ambiguous, allowing commanders broad, if not unfettered discretion and latitude.

To compound the confusion, the regulatory provision "does not respect differences in rank and grade" is unclear.¹⁷¹ There are countless ways this lack of respect may be demonstrated, and one may safely assume that deeds constituting insubordination would be prosecuted under Article 89, UCMJ.¹⁷² Therefore, this must refer to failure to maintain an appropriate distance. Since the distances maintained between ranks vary dramatically between services, and within commands of an individual service, the intent of this provision is difficult to fathom. Paragraph (2) significantly broadens the scope and application of fraternization to include relationships between officers and between enlisted personnel, "where a senior subordinate relationship exists." This paragraph creates a subset of the traditional officer-enlisted fraternization. Section 4b states that in a joint service working relationship, the Naval servicemember will be held accountable if a "senior-subordinate relationship" exists. That the regulation is silent as to which party is to be punished suggests that both parties are responsible.

The Navy relies heavily upon "custom and tradition" based notions of fraternization,¹⁷³ but it is precisely this basis

which is most susceptible to attack during periods of rapid change. The difficulty with a custom-based regulation providing any flexibility within a reasonable period of time is self-evident.¹⁷⁴ But when, during social change, does someone with the requisite authority acknowledge that custom has changed? In a military organization steeped in tradition, resistance to change is a valid concern. That customs change slowly might argue in favor of using custom as a basis for fraternization regulations. But some areas must be responsive to the times.

Ultimately, custom is a poor device for defining criminal offenses.¹⁷⁵ It is at the same time inflexible and indescribable.¹⁷⁶ After all, who provides the standard? The admiral or the yeoman? The surface line community or the submariners? The aviators or the hospital corpsmen? Different services are held to radically different standards of grooming, etiquette, and discipline. The differences in custom and conduct within services is yet another aspect of the difficulty inherent in a custom-based fraternization regulation. If different customs exist within a service, then there really is no custom at all. The Navy finds itself caught on the horns of a dilemma. It must acknowledge in paragraph 3a, that "proper social interaction among officer and enlisted ranks [is encouraged] . . . as it enhances morale and esprit de corps." Yet, the next sentence offers this

caveat: "At the same time, unduly familiar personal relationships . . . have traditionally been contrary to naval custom." This only serves to reignite the debate about what is acceptable and what constitutes fraternization.¹⁷⁷ The Navy gets defensive, and notes that this "uniquely military concept might be offensive in a civilian organization."¹⁷⁸

While servicemembers enjoy First Amendment freedoms, these protections may be restricted based on the needs of the military to accomplish its mission.¹⁷⁹ Military personnel, in fact, give up many rights.¹⁸⁰ "By statute and regulation, soldiers are also prohibited from forming unions, protesting, assembling against their commanders, publishing papers urging disobedience of orders, and fraternizing with subordinates."¹⁸¹ The Navy asserts in a conclusory manner that, "In the context of military life, however, it serves a valid and necessary purpose."¹⁸² But this "valid and necessary purpose" of the regulation is only relevant in the context of assisting commanders in maintaining good order and discipline.¹⁸³ "First and foremost, the military justice system should deter conduct which is prejudicial to good order and discipline."¹⁸⁴

b. Ambiguities

The Navy's definition of fraternization¹⁸⁵ prohibits any romantic or sexual relationship between officers and enlisted

personnel. Even a date would be "inappropriate." It is ironic that a feeble term such as "inappropriate" carries criminal implications. The word "prohibited" would have been more "appropriate." Anything less than a prohibition attenuates the criminality of the conduct.¹⁶ The most interesting aspect of the Navy regulation is the blanket prohibition on officer-enlisted fraternization, while there is a narrow prohibition against officer-officer and enlisted-enlisted fraternization where a senior-subordinate relationship exists. This suggests a class distinction. It also clouds the issue since "senior-subordinate" relationships can exist between members of different services, but whether officer-enlisted fraternization can occur with a member of another service is not addressed, either internal or external to the chain of command.

Another critical area of the naval regulation is the "prohibited relationships" paragraph. This description begins with an inherent contradiction. "Fraternization . . . is punishable as an offense under the UCMJ when it is prejudicial to good order and discipline or brings discredit to the naval service." By definition, then, fraternization does not become actionable without proof of prejudice to good order and discipline or discredit to the naval service. This is true of all acts punished under Article 134. Yet nowhere does the regulation state

that certain types of conduct are "per se" fraternization. Even though "dating, cohabitation, and sexual intimacy . . . are clearly inappropriate" (emphasis added), does this make them per se actionable fraternization? If it does, then why not say so?

Discredit to the service,¹⁸⁷ it is safe to assume, is primarily defined by civilian perception.¹⁸⁸ But when have civilians raised their collective eyebrows over two service personnel dating?¹⁸⁹ It is the prosecution of this conduct that is service-discrediting conduct, quite frankly, and that self-evident truth is reinforced each time a fraternization court-martial receives public scrutiny.¹⁹⁰ "Pure" fraternization¹⁹¹ can never be service discrediting except where it involves homosexuality, which is not contemplated in this thesis. Therefore, the Navy must rely on prejudice to good order and discipline, which is also inadequate to explain prosecutions for "pure" fraternization.

The Navy's approach encourages counseling and administrative remedies prior to disciplinary action:¹⁹² "If the two are really in love then you move them to another department. If you still can't solve the problem, then disciplinary action would solve the problem."¹⁹³ But love is such a pesky problem that it frequently results in marriage. What then? "Fraternization is not excused by a subsequent marriage between the offending parties."¹⁹⁴ But

then what is one to make of the very next paragraph¹⁹⁵ stating, "Servicemembers who are married . . . to other servicemembers must maintain the requisite respect and decorum attending the official relationship while either is on duty or in uniform in public." Does this mean that fraternization really is authorized sub rosa when solemnized by wedding vows, so long as it remains "out of sight, out of mind"? This problem is identical to the Marine Corps experience, and neither service will satisfactorily resolve the inherent conflict between their fraternization and marriage policies until they adopt a more realistic stance.¹⁹⁶

In spite of the Navy's noble effort to promulgate an understandable regulation, it has ultimately only added to the confusion. In an effort to clarify the issue, senior commanders have from time to time sent messages to their subordinate commanders.¹⁹⁷ The common aspect to these naval regulations, comments, and messages is the concern for conduct within the chain of command. Why officer-enlisted fraternization external to the chain of command presents a problem is simply not addressed, except through off-hand, nebulous references to custom. This omission is the fatal flaw of this regulation, and may be intentional--since it only applies to officer-enlisted relationships, the prohibition is clearly based on the outmoded social and class-based distinction.

Fraternization is a touchy subject, and everyone knows it.¹⁹⁸ Thus, each service drafted its fraternization regulation meticulously--perhaps with greater care than other punitive policies. The latest Navy regulation on the subject of fraternization appears in Appendix D. This regulation is modeled on the OPNAV Instruction. The term "custom" does not appear. This deletion, with the use of the term "tradition" in its stead seems particularly ill-advised in light of the mandates of Article 134, UCMJ.¹⁹⁹ The intent of the regulation, however, is to clarify its applicability. Prior to the publication of Article 1165, input was requested and received from all areas of the Navy.²⁰⁰ The final draft for the 1988 U.S. Navy Regulations was significantly different from the original.²⁰¹ The actual regulations replaced the word "prohibited" with "inappropriate," a strange decision indeed for a punitive regulation. But the negotiations and study of the wording continued.²⁰² Clear guidance on this aspect of the offense is critical for the actual Article 134 offense of fraternization does not specifically contemplate any fraternization other than officer-enlisted. Is this new law, or perhaps new custom?²⁰³ In another memo to the Chief of Naval Operations, the Judge Advocate General of the Navy weighed in.²⁰⁴ The footnoted recommendation from Code 20²⁰⁵ within Navy JAG, correctly points out a critical problem with the

draft.²⁰⁶ The author notes that the article is "likely to be construed as containing both a policy statement (officer-enlisted personal relationships are inappropriate) and a punitive regulation (prejudicial and discrediting relationships are prohibited). This distinction is crucial--while violation of a punitive regulation is an offense under the UCMJ, violation of mere policy is not."²⁰⁷ A different memo was submitted by Code 20 about two weeks later,²⁰⁸ pointing out other problems. This was not the end of the issue. The Judge Advocate General of the Navy sent yet another memo to the Chief of Naval Operations.²⁰⁹ Finally, the regulation was approved.

2. U.S. Marine Corps Policy

The Marine Corps, as a part of the naval service, and within the Department of the Navy, is subject to U.S. Navy regulations. Unfortunately, the Navy does not always fully consult with the Marine Corps prior to publishing its regulations.

a. Analysis

The Marine Corps regulation stands in sharp contrast to those of the other services by virtue of its brevity and age.²¹⁰ Not surprisingly, the Marine Corps has the strictest policy on fraternization. Indeed, officer-enlisted relationships may well be strict liability affairs. The first paragraph is truly the meat of the regulation. Given this rather vague²¹¹ standard, it

is ironic that the Marine Corps has the strictest rules. An examination of the scant regulation reveals a title which covers only relationships between officers and enlisted Marines. That is virtually the only specific guidance in the regulation. The remainder is so nebulous that the drafters must have desired it to be that way. The next sentence covers "duty relationships" and "social and business contacts" which encompasses the full spectrum of human interaction. The regulation might just as well read "all contacts" since that would not change its meaning. Next, by mentioning "Marines of different grades," one could reasonably argue that the regulation contemplates relationships between officers and between enlisted Marines. A subsequent reference to "Marines of senior grade and those of lesser grade" makes this meaning more likely, but the title of the regulation casts too much doubt on that. Interestingly, no reference is made to "custom of the service"¹² specifically, even though that is the clear thrust of the language which refers to "traditional standards of good order and discipline and the mutual respect that has always existed between Marines of senior grade and those of lesser grade." The last sentence, then, provides all the guidance the Marine Corps has to offer. "Situations that invite or give the appearance of familiarity or undue informality among Marines

of different grades will be avoided or, if found to exist, corrected" (emphasis added).

b. Ambiguities

The flexible language, subject to different, yet plausible interpretations, allows commanders extreme flexibility in dealing with fraternization. The absence of strong language such as "prohibited" or "violate" leaves one guessing about the punitive nature of the regulation. The absence of references to personnel of other services, including Navy personnel, is also noteworthy.²¹³ By definition, this regulation specifically applies only to Marines, yet in practice it is generally understood to cover relations with other services. This is unjustifiable.²¹⁴ If Marines are not permitted to fraternize with members of other services, the regulation should so state. This incredible ambiguity has exasperated commanders.²¹⁵ They are understandably uncomfortable with wide latitude in this undefined area and do not feel they stand on firm ground when attempting to interpret the regulation to the detriment of their Marines. Junior Marine officers looking for guidance will not find it in the regulation, nor in any other Marine Corps publication. Rather, they must depend on whatever their peers and commanders tell them. When one considers that the Marine Corps frequently prosecutes fraternization cases, this is no way to do

business. The Marine Corps obligation to follow the Navy Regulations confuses matters even further.²¹⁶

From a literal interpretation of the policy, the Marine Corps could prosecute a staff sergeant for dating a gunnery sergeant, yet it could not prosecute a first lieutenant for dating an Army sergeant. At what rank differential does dating become prohibited between officers and between enlisted Marines? Can the Marine Corps prosecute interservice fraternization?

Officer-enlisted marriages provide a particularly thorny problem. At one point, the Commandant of the Marine Corps considered sending out a White Letter²¹⁷ on that topic. His staff judge advocate, in a memorandum, echoed many concerns which simmer beneath the surface of the issue.²¹⁸ Where are Marines to look for definitive guidance on the boundaries of acceptable conduct? Even the caselaw abounds with ambiguity.²¹⁹ The regulation is the last place to look, unfortunately, since regulations usually settle arguments. This policy creates many more issues than it settles. The ultimate arbiter of a fraternization case in the Marine Corps is the highest level commanding officer aware of it. Since the regulation gives him very little guidance, he is free to superimpose his own notions of morality into the equation, and subject his subordinates to that standard. Thus, a frequently fraternizing lieutenant working for

a stern, socially conservative, married, religious commander with thirty years service had better stay home at night, but when he transfers to a unit commanded by a single, atheistic, hedonistic reserve officer with five years service, he can do as he pleases, so long as he keeps it quiet. While this hypothetical is intended to be humorous, it nonetheless highlights the point that the commanding officer's views become more important than Marine Corps policy. This is the danger, from both an institutional and individual standpoint, of such flexible regulations.²⁰ One might legitimately point out, in response to this argument, that there is really no problem with a commander imposing his own notions of morality on an offense. The UCMJ is full of that type of discretion. That is what commanders are paid for. While this sounds like valid reasoning, it is fallacious. Consider a commander confronted with a lance corporal who was disrespectful to a sergeant. Assuming that the disrespect was not outrageous, the commander might decide that nonjudicial punishment was appropriate, and impose a forfeiture of pay and restriction. Ten commanders confronted with this offense, would all respond in this "ballpark" of punishment. Not so with fraternization. For example, if a Marine lieutenant had a "one night stand" with an enlisted woman not in his chain of command, the same ten commanders would produce a far greater range of punishments. One

commander would probably recommend a general court-martial while another would recommend no action at all.

It is worth considering this same issue regarding other Article 134 offenses.²²¹ Upon study of the fraternization specification, a standard is nowhere to be found. Since custom is an aspect of it, one is required to go beyond it to ascertain its true meaning. Since the regulation is hazy, there is no place left to turn. All this ambiguity of necessity lodges great discretion in the commander who must ultimately enforce the policy. But the law does not favor total standardless discretion based solely on personal fiat.²²² Even federal judges have been given rather restrictive guidelines.²²³ Guidelines are necessary to provide due process to the policy. When neither commanders or Marines are sure of the policy, a void for vagueness²²⁴ issue arises. A Marine Corps-wide policy applied differently at each command is unsatisfactory. In fact, it becomes policy by name only. But the Marine Corps leadership is quite satisfied with the policy as it is, preferring to rely on the judgment of its commanders to deal equitably with this problem.²²⁵ The options available to a commander include:

- 1) counseling a) unofficial
 b) official
- 2) fitness report comments and appropriate markings

- 3) nonjudicial punishment
- 4) court-martial at an appropriate level
- 5) recommend commencing administrative separation processing²²⁶
- 6) recommend delay of an officer's promotion²²⁷
- 7) recommend removing a regular officer's name from a selection list²²⁸
- 8) recommend removing a reserve officer's name from a selection list²²⁹
- 9) recommend approval of the officer's request for resignation²³⁰

All services have essentially the same options, with differences being more procedural than substantive. The Army lists several creative additional options:

- (1) Relief from command.
- (2) Revocation of security clearance.
- (3) Requiring unmarried soldiers to move back to post.
- (4) Reduction for inefficiency.

The alternate method of prosecution is as a violation of a lawful general regulation under Article 92. Marine Corps practice recommends a safer approach--having the offending Marine's commanding officer order the Marine to refrain from fraternizing, and upon noncompliance, prosecuting the conduct as an Article 90

violation.²³¹ This also has the benefit of providing clear notice. In its fraternization guidance, understandably necessary because of ambiguous regulatory policy, the Corps places a heavy emphasis on senior-subordinate relationships and maintenance of good order and discipline within the unit.²³² The Marine Corps teaches that it is erroneous to identify fraternization as an exclusively male-female problem, even though that is the type which almost exclusively goes to courts-martial. Phrases such as the following abound, "Fraternization is a term used to describe one type of improper personal relationship that is harmful to military organizations if allowed to continue" (emphasis added).²³³ Ensuing discussions state that fraternization is bad, but fail to explain why--especially when it occurs outside of the chain of command.²³⁴ The emphasis on the unit is clear. In order to "disrupt good order and discipline, undermine unit morale, and destroy successful working relationships among Marines,"²³⁵ one would expect that fraternization contemplated must occur within the unit. After all, there is no readily apparent deleterious effect if it occurs outside those confines. To the extent that there may be such an effect, it is de minimis.

The remainder of the Marine Corps regulation, quoting Major General Lejeune, purports to shed further light on the issue. While these words are motivating and legendary, they provide no

real guidance on the issue of fraternization. The term fraternization is not mentioned since it was not a problem at that time--particularly the male-female variety. These words have no relevance to the issue; they are mere surplusage from the viewpoint of legal analysis.

The Marine Corps relies heavily on continuous mandatory leadership training,²³⁶ but allows training frequency to be determined by individual commanders.²³⁷ Since fraternization appears at number thirteen on a list of twenty²³⁸ suggested topics for leadership training, it is safe to assume that it is not a frequently discussed topic.²³⁹ Thus, the Marine Corps' reliance on leadership training to explain its amorphous standard is misplaced. Furthermore, due to the limited official guidance available,²⁴⁰ it is conceivable that Marines in one command could reach an entirely different conclusion regarding the limits of permissible conduct than Marines in another unit. While Marines hear of fraternization cases in hushed whispers, most Marines know that it is commonplace. The Marine Corps tracks all officer misconduct cases, to include fraternization,²⁴¹ revealing that it is alive and well.²⁴² Given the rugged competition for promotion, each number represents a career in ruins. Not included in the numbers are those cases which resulted in no punishment.²⁴³ How many officer careers were destroyed by forced

resignation or cut short due to a comment on a fitness report?

And then, of course, there are the countless undiscovered fraternization cases not covered by these statistics.²⁴⁴

In considering a case for disposition under the UCMJ, the Marine Corps makes no distinction between a fraternization case and other offenses, and it specifically leaves broad discretion to the commander concerned.²⁴⁵ Most relationships evaluated as harmful are viewed as such due to their impact upon the command structure. This presupposes some on base, in uniform contact between the Marines concerned.²⁴⁶ An off-base, consensual non-uniformed meeting by single Marines of opposite sex not in each other's chain of command seems to have minimal if any impact on the command. More specifically, it hardly runs afoul of any of the evaluative guidelines.²⁴⁷ The official position represents that the current policy needs no further clarification.²⁴⁸ But additional guidance is necessary, and much more at that.²⁴⁹ Through the policy's inherent vagueness and potentially unlimited scope, Marines are "chilled" in their range of association through a fear that someone could perceive their conduct as violative of the regulation.²⁵⁰ To be safe in the Marine Corps, it is wise to either get married (and remain faithful), remain celibate, or only date civilians without military connections.

3. U.S. Army Policy

The Army policy on fraternization is not as sweepingly broad as the Navy or Marine Corps policy. The Army policy is reproduced in Appendix B.

a. Analysis

The Army regulation attempts, in a human and sincere way, to come to grips with fraternization, and to publish understandable and recognizable boundaries of acceptable conduct. Rather than use the stronger language of a specific prohibition in the policy, the Army chose to use substantially weaker language, indicating that "such relationships will be avoided."¹¹¹ Paragraph 4-14 (a) indicates that relationships between soldiers of different rank are authorized unless they have one of the three enumerated effects listed in that paragraph. Commanders are to counsel soldiers involved in such relationships only if the relationship fits one or more of the three effects. The first effect, "actual or perceived partiality or unfairness," practically requires a chain of command or supervisory relationship, for without it a senior can do little to cause actual partiality unless he holds an extremely high rank or billet. Since most fraternization occurs at the company grade level, assuming the Marine Corps statistics, infra, are representative,¹¹² this thesis does not contemplate fraternization perpetrated by colonels, generals, and

admirals.²³³ Additionally, even though perceived partiality is a much easier criteria to meet, it is still tough to legitimately discern it outside the chain of command. For example, is there perceived partiality where a female enlisted soldier is dating an Army captain who works at another installation, but who happens to be best friends with her commanding officer? If so, it appears too attenuated to establish anything resembling legal sufficiency. If the female soldier flaunts the relationship, however, it might constitute actual or perceived impropriety.

The second criteria in paragraph (a) "involves the improper use of rank or position for personal gain." Such conduct would constitute aggravated fraternization since it hints at lack of consent due to leverage or mild extortion exerted by the senior. This form of fraternization would best be dealt with under another criminal article.²³⁴ Even so, this would most likely occur within the chain of command, for how else could one really exert such influence without possessing an extremely high rank? The only scenario where this could arise would be where a finance or leave clerk threatened adverse action to a soldier's account unless she agreed to sexual relations, but this looks like extortion, and not fraternization.

The last criteria is that the relationship "create an actual or clearly predictable adverse impact on discipline, authority, or

morale." To meet this standard, the relationship would again probably have to be in the chain of command. An exception would be where two fraternizing soldiers, perhaps a lieutenant and a corporal, were foolish enough to hold hands, kiss, or embrace on base, and in uniform. Even though they may work on separate coasts, such conduct would meet this standard.

Romantic relationships between soldiers of different rank, to include officer-enlisted relationships, are authorized outside the chain of command, so long as they remain off-base, and out of uniform--a corollary of the "out of sight, out of mind" approach to violations.¹³⁵ Fraternization can encompass officer-officer relationships, also.¹³⁶

If the regulation stopped there, it would have actually stated a clear policy, allowing soldiers considerable latitude in their relationships. Unfortunately, the remainder of the regulation, which purports to expound upon the basic rules, serves only to render perplexing what was reasonably understandable. The next subparagraph immediately confuses the issue. It gives unit commanders wide discretion to set the "leadership climate" of the unit and therefore "set the tone for social and duty relationships within the command" (emphasis added). A unit commander could have a permissive or restrictive view on fraternization. The question this paragraph raises, however, is why one commander can have a

wholly different policy on fraternization than another. Since they apparently can, then what is the Army custom? If there is no consistent custom, the regulation itself is flawed and in peril.¹⁷ Paragraphs (c) and (d) are similar to the Marine Corps' inclusion of Major General Lejeune's comments; they provide valid commentary on leadership and command of a unit, but give no substantive guidance on fraternization and as such constitute excess baggage. At paragraph (e), good judgment is stressed as vital. This is especially so in light of the following three sentences, which are impossibly contradictory in the context of the entire regulation. Since the Army policy fails to define fraternization, and specifically avoids the term for the most part, references to "associations" become oblique because one cannot know whether appropriate or prohibited associations are being addressed. The following paragraph thus suffers from internal contradiction: if certain conduct does not constitute fraternization, then why would it be inappropriate, and what adverse action should be taken, if any? The following paragraph is also inconsistent with the remainder of the policy which attempts to do soldiers the service of providing a "bright line" rule. Since this paragraph injects doubt about relationships which "are not fraternization" it does a great disservice to the ultimate goal of clarity.

An association between an officer and an enlisted soldier might not be considered fraternization yet still be inappropriate. Similarly, certain relationships between enlisted soldiers, or between officers, may be inappropriate. Just because a certain relationship does not break the law, does not mean it is acceptable or appropriate.

If nothing else, this allows a commander to perceive (and punish) fraternization where it does not exist by marking a soldier down on his Officer Efficiency Report²¹¹--something ultimately as devastating to a career as a court-martial.²¹² If conduct is "inappropriate" yet not unlawful, how far can a commander go in terms of taking adverse action against the offender? This question is left unanswered. Thus, how can the soldier ever know exactly what conduct is "inappropriate"? Subparagraph e(2) continues to muddy the waters. "The policy applies to all relationships between soldiers of different rank. Any social or duty relationship may result in an impropriety. When soldiers date or marry other soldiers junior in rank, the potential for problems increases." If the potential for problems only "increases" when a major marries a corporal, one must wonder when it really gets bad? At least the Navy came right out and said that dating is inappropriate. What is the Army saying? When is a soldier who dates a junior soldier in trouble? The bounds of this regulation must be more specific. The parameters of "acceptable conduct"²¹³ must be described. This regulation exhibits a

tremendous amount of equivocation in critical areas. Is "pure" fraternization wrong? Is the Army ultimately admitting that it must accommodate fraternization in some forms? The essential admission is that they must accommodate the results of undetected fraternization, which may be defined in the marriage context as most aspects of the relationship prior to the marriage. This must be accommodated as surely as they must accommodate pregnancy out of wedlock. Obviously these decisions were made more for political reasons than out of concerns for military efficiency. When all is said and done, marriage is the great non sequitur of the fraternization regulations.²⁶¹ This points up the greater problem of what to do with these "mixed" marriages. The regulations themselves are not at fault, for they merely reflect a policy decision. Even assuming arguendo that fraternization preceded the marriage, the Army and all the services recognize that their ability to interfere is extremely limited. Marriage--the ultimate "association"--is simply an issue (or institution) that the services do not want to "take on" in what would be a losing battle.²⁶² The logical conclusion is that the policy leads to significant compromises--and this is but one of them. While marriage is inconsistent with fraternization as a conceptual matter the military must accommodate it anyway.²⁶³ Sub silentio, if soldiers keep relationships clandestine and then marry, they

have achieved the equivalent of a grant of immunity, while the same fraternization destroys the careers of many fine officers. It is difficult to find fairness in this juxtaposition.

Both the Army and the Marine Corps have fallen into the same trap. Both state their true policy in one or two paragraphs. Yet, apparently feeling uneasy about simply letting it stand at that, felt the urge to expand upon it. Perhaps if there are ten paragraphs instead of one it might appear as if the service had provided substantive guidance. Subparagraph 3(4) discusses "abuse of authority" but when that occurs something other than a mutually consensual relationship exists, and the relationship is probably within the chain of command. Since this has already been prohibited by paragraph (a)(2), this adds nothing to an understanding of the Army's concept of fraternization. Subparagraph e(5) discusses special situations such as training and schools.²⁶⁴ The Army acknowledges that relationships in such contexts (trainer-trainee)²⁶⁵ are "fraught with the possibility of actual or perceived favoritism, and are, therefore, potentially destructive of discipline, authority, morale, and soldier welfare" (emphasis added). Why has the Army gone to great lengths to point out the obvious problems with such relationships and yet used such weak language? The following language in the same paragraph repeats the error: "Also discouraged are relationships between

senior and subordinate members of the same unit or between soldiers closely linked in the chain of command or supervision" (emphasis added). Once again, flimsy language is used regarding what appeared to be prohibited conduct under paragraphs a(1) and (3). These very relationships referred to as "discouraged" are "prohibited" in paragraph 4-15. This makes no sense.⁶⁶

By continuing to wade through this tangled web of contradictory guidance, subparagraph e(6) contains significant provisions distinguishing the Army's policy as far more flexible, permissive, and realistic than either the Navy or Marine Corps policy. The first sentence defines situations where there exists "the strongest justification for exercising restraint on social, commercial, or duty relationships." As described, it encompasses perhaps a bit more than envisioned by direct chain of command relationships, yet it is sufficiently restrictive and specific so as to provide solid guidance to all soldiers. That is, "where the senior has authority over the lower ranking soldier or has the capability to influence action, assignments, or other benefits or privileges." This brilliantly captures the real concern of fraternization outside the chain of command. Indeed, one can envision a senior NCO who worked in a personnel section who "offers" to get a female soldier transferred to a less onerous duty on the same installation with the implied obligation of

sexual reciprocity. In this hypothetical, though, this is not consensual fraternization because there is undue influence at work. To improve upon this provision, the Army could add after "or has the capability," the words, "or attempts." Then, even an unsuccessful endeavor at interference with the command could be punished.

Where such a relationship does not exist, however, "social relationships are not inherently improper and normally need not be regulated." This means that a sergeant major may freely date a private in the Army, so long as there is no chain of command relationship, no ability to influence actions, assignments, benefits, or privileges, and no visible conduct of the relationship on base or in uniform. The last criteria is important because of the Army's insertion of a final caveat into that subparagraph: "Soldiers must be aware, however, that even these relationships can lead to perceptions of favoritism and exploitation under certain circumstances." Indeed, a sergeant major-private relationship would fit that description.²⁶⁷

Subparagraph e(7) is surplusage, urging commanders to "exercise their best leadership." Subparagraph e(8), though, provides more substance. It specifically places the onus on commanders²⁶⁸ to define what relationships are improper and urges counseling to be the initial corrective action.

A close unofficial relationship between soldiers of different rank normally should not result in an unfavorable evaluation or efficiency report, relief from command or other significant adverse action unless it clearly constitutes a relationship that violates this policy. (emphasis added)

The above is substantial ammunition for defense counsel. It provides the basis for an appeal from an adverse administrative action. Additionally, what clearly constitutes a relationship that violates this policy? Defense counsel should argue that any non-chain of command relationship is authorized. Subsequently the emphasis is renewed on allowing the soldier to terminate the improper relationship prior to taking "significant" action against him. Subparagraph e(9) states that where an unauthorized relationship exists, the Army will act to terminate it. Paragraph 4-15 "prohibits" trainee and soldier relationships.¹⁶⁹ The issue is confused by prior mention of these relationships in subparagraph e(5), which does not clearly prohibit these relationships but merely restricts and discourages them. That apparent contradiction is unsatisfactory, and either one or the other should be deleted. Paragraph 4-16 is titled "Fraternization" and is only the second time this word has appeared thus far.¹⁷⁰ Apparently, since section 4-16 "prohibits" relationships between officers and enlisted soldiers, when officers date officers and enlisted personnel date enlisted personnel, those are "relationships between soldiers of different

rank." Only officer-enlisted relationships constitute fraternization. This definition is closely related to the Manual's²⁷¹ definition of fraternization, but it is unnecessarily restrictive, and revives issues of social distinctions. Treating fraternization so briefly is inexcusable. "Relationships" are prohibited between officers and enlisted soldiers. Is this a blanket prohibition or does it only apply within the chain of command? What is a relationship? This gives a commander the power to read this as broadly as going fishing together, or to construe it narrowly, restricting it to only sexual activity. To dismiss it by noting that it is "prohibited by the customs of the service," does a disservice to anyone attempting to search for guidance. What custom? The same custom that allows a sergeant major to date a private?

The regulation ultimately fails to achieve its purpose. It is sorely lacking in definitive specifics and concrete analysis. The Army is not completely at fault, however, for it is forced to rely on the Manual as promulgated by the President. The Army, and all the services, are therefore forced to rely on custom-based notions of fraternization, even if they do not actually exist.

4. U.S. Air Force Policy

The Air Force, recently battered by court decisions regarding its fraternization policy,²⁷² was painfully aware of

the inadequacy of its regulations in this area.²⁷¹ Thus, the Air Force created a significantly more restrictive policy. In the prior regulation,²⁷⁴ social and personal relationships between Air Force members were "normally matters of individual judgment."²⁷⁵ The only exception to this general rule was where the relationship impacted adversely upon "duty performance, discipline, and morale."²⁷⁶ Since the new regulation significantly tightens up this policy, one must assume that the custom of the Air Force has changed significantly in the past seven years. The new Air Force policy on fraternization appears in Appendix B.

a. Analysis

The Air Force Regulation is unique since it specifically addresses "members of other uniformed services." Given the way the military frequently task organizes forces and fights in unified commands,²⁷⁷ it is inconceivable that each service's regulation would not provide specific guidance on this important and legitimate aspect of fraternization.

The Air Force encourages professional relationships among its personnel and discourages "unprofessional relationships."²⁷⁸ But what is an unprofessional relationship? The definition is imprecise, and the Air Force uses the "must be avoided" language rather than "prohibited," which is a mistake.²⁷⁹ One of the most

worthwhile areas for analysis is the custom of the Air Force on fraternization. Since the Air Force is under fifty years old, not even one-quarter the age of the other services, it seems arguable that its custom might not be well established, if it exists at all.²⁰⁰ The regulation itself in paragraph 2 refers to the "heritage of the American military for over 200 years." But this regulation does not address the American military in general--it specifically applies to the Air Force. It is fallacious and specious to gratuitously add this tidbit of historical lore. The Air Force cannot "piggyback" a custom-based regulation from the other services to make up for time in which it did not exist. When Article 134²⁰¹ refers to a custom of the service it is referring primarily to individual services and not the collective military.²⁰² It is only through this reasoning that substantially dissimilar fraternization regulations have been justified. This regulation also indicates the Air Force's willingness to provide for "reasonable accommodation of married couples and related members."²⁰³ It is hard to imagine a more incongruous juxtaposition. It is "verboten" for an officer to date an enlisted woman, but permissible if he wishes to marry her. This ludicrous predicament, which all the services have placed themselves in, is ultimately the "foot in the door" which will force a relaxation of the fraternization regulations.²⁰⁴

Subparagraph 2(b) seeks to provide guidance in specific situations. The Air Force notes that relationships in the same chain of command "are almost always unprofessional," but adds "closely related units" to this category. This expands the commander's ability to apply the regulation. Specifically envisioned are cases where the servicemember can "influence assignments, performance appraisals, promotion recommendations, duties, rewards, and other privileges and benefits."²¹¹ This part of the policy appears to have relied heavily on the Army regulation, or similar concerns.

Given the Air Force's limited history and past practices with regard to issues of fraternization, this regulation is literally "out of the blue." This policy illustrates dangers posed by "custom based" regulations. The menace revealed by this regulation is rather transparent. Senior Air Force officials met and decided what the policy should be, and then labelled it custom. While promulgating a normative standard is really the way to do business in a military organization, to allow new policy to masquerade as custom is patently deceptive.

While the Air Force regulation would seem to place a blanket prohibition on officer-enlisted relationships, it does so in a very circuitous manner. Fraternization is defined²¹² as officer-enlisted relationships which "violate the customary bounds of

acceptable behavior." This type of relationship "must be avoided." The reference to custom is troubling. In an earlier article on fraternization, an Air Force colonel stated, "The ban on fraternization is at best a custom which is losing its vitality. At worst it is a lingering but enforceable relic of a bygone era. Reluctantly, one must conclude that the latter is closer to the truth than the former."²⁸⁷ The author points out that fraternization in the Air Force is rampant, and on the rise.²⁸⁸ With customs like these, it is a poor star to set one's compass by, but it is clarified subsequently, in paragraph 2(b)(2), where, in a discussion of dating, the official advice is to "consider the potential impact on the organization." From that statement, the next sentence makes the huge leap to proclaim, "It follows that officers do not date enlisted members." Unfortunately, it does not follow--in fact, it follows only if the fraternization occurs within the organization. Thus, while this new policy purports to outlaw officer-enlisted dating, and is far more specific about it than the 1983 regulation, the language of the regulation which is susceptible to different meanings, coupled with the Air Force's true past liberal custom on fraternization, ensure that this policy will come under fire.²⁸⁹ The other issue which clouds the officer-enlisted dating issue is in the fraternization paragraph itself. The policy indicates that only

when the conduct prejudices good order and discipline will criminal charges be brought.²⁹⁰ This dovetails neatly with the issue of impact on the organization.

Another interesting aspect of the Air Force regulation is the "Commander and Supervisor Responsibilities" section. Unlike the Army, the Air Force commander is not left to his own devices to set the tone as he sees fit. Nor is the Air Force commander to simply enforce the policy, as in the Coast Guard regulations, infra. Rather, the Air Force compromises, charging him with maintaining good order and discipline within the unit, based on his own notions of which relationships might so infringe. The question, by inference, becomes whether he will attempt to apply his own understanding of Air Force "custom" to make this determination, attempt to use the new policy to guide him, or simply throw up his hands in understandable exasperation. Actually, this dangerous level of ambiguity coupled with broad discretion can lead to selective prosecution which, in fact, frequently occurs where fraternization is coupled with adultery.²⁹¹

Many feel that the Air Force has institutionally castrated fraternization by implementing policies and procedures²⁹² which not only blurred the line of the officer-enlisted distinction, but actually bolstered the prestige of the senior enlisted ranks at

the direct expense of junior officers.²⁹³ Although the Air Force has adopted a new regulation, it may be too late. The courts are tired of reviewing Air Force fraternization cases.²⁹⁴

b. Conclusions

The new Air Force regulation represents a radical departure from their true practice. The artificiality of the regulation does not match the reality of custom. This raises issues of fairness and notice. It is unfortunate that the Air Force abandoned its 1983 regulation, which was capable of punishing fraternization in the chain of command.²⁹⁵ Now the Air Force has opened a Pandora's box, and most current fraternization case law concerns the Air Force.²⁹⁶ Astute counsel should prepare to attack this regulation as without basis in custom, which it purports to, but does not represent. Rather, it is mere dictate, grounded in ambition.

5. U.S. Coast Guard Policy²⁹⁷

The Coast Guard recently published its first fraternization policy.²⁹⁸ In the past, they have relied on the judgment of unit commanders to rein in unacceptable conduct. It is interesting that the Coast Guard picked this particular time to draft its regulation.²⁹⁹

a. Analysis

The Coast Guard has drafted a superior regulation. While it contains a good deal of excess verbiage, it also contains significant substantive guidance. The first and second paragraphs¹⁰⁰ provide background information and define fraternization in its traditional non-gender specific context. The term "inappropriate" is used rather than "unprofessional," regarding relationships to be avoided.¹⁰¹ Thus, the word "prohibited" does not appear in this policy--not even in the context of instructor-recruit¹⁰² relationships. The policy specifically "reflects the customs and traditions of the Service."¹⁰³

In the Coast Guard, commanders are to ensure that all hands are familiar with the policy and "take appropriate action in response to violations."¹⁰⁴ The Coast Guard regulation offers specific guidelines for assessing the propriety of a relationship,¹⁰⁵ and is the most realistic in its approach to acknowledging that it is relationships between members of the opposite sex that the services are primarily concerned with.¹⁰⁶ The Coast Guard recognized the inherent immunity attaching to marriage¹⁰⁷ and they handle it deftly. "Such relationships do not, by themselves, create problems and are accepted." But what magical status does marriage confer upon a relationship making it

any less prejudicial to good order and discipline than if the same two individuals concerned were in the same relationship and yet not married?¹⁰⁸

The Coast Guard regulation is most likely the regulation of the future, for it contains no per se ban on officer-enlisted relationships, to include dating and sexual relationships.¹⁰⁹ In so doing, this is the first regulation to officially acknowledge the death of the social/class distinction. Officer-enlisted relationships are to be evaluated under the same guidelines that are to be utilized for assessing any relationship. The central issue to assessing the propriety of a relationship is the authority the senior member exercises over the junior within the chain of command. As contemplated by the Army and Air Force regulations, any supervisory authority or capability to influence personnel actions, assignments, benefits, or privileges makes the relationship highly suspect. In such cases, the Coast Guard advises that, "there is strong justification to exercise restraint."¹¹⁰ This language is even weaker than terming such relationships "inappropriate," and is the most ambiguous aspect of the regulation. Absent any of these specifically delineated issues, other relationships between consenting parties are authorized. Thus, there would be no problem with a lieutenant stationed on a cutter dating an enlisted woman located at a

separate Coast Guard station. It is safe to assume that the Coast Guard sees no problem with a Coast Guard officer dating an enlisted member of another service so long as none of the guidelines for propriety are violated.³¹¹

b. Conclusions

In comparison to the other fraternization policies, the Coast Guard's is the most liberal, realistic, and specific. Coast Guard commanders have reasonable latitude in disposition of cases, but nothing approximating the overbroad discretion evident in other regulations. In drafting the regulation, the Coast Guard looked to its actual custom, and made the regulation reflective of it. Thus, the "imposition" of the regulation changed nothing in practice, and served to merely codify the custom. This stands in sharp contrast to the Air Force which stealthily drafted its regulation based on institutional aspirations. The Coast Guard method is far more consistent with the intent of custom-based regulations, and is ultimately far better for the men and women who must comply with it.

B. A Functional Analysis of the Regulations

1. Introduction

Having individually analyzed the regulations of each service, a broader perspective contrasting their collective utility is appropriate. The ostensible purpose of the

fraternization regulations are to promote good order and discipline in the ranks of the services, individually and collectively. To this end, the services have used custom of the service as a basis for latitude in tailoring their own regulations. Good order and discipline logically refers to relations between all military personnel--not just between officers and enlisted men. The first assumption vulnerable to probing is the need for the services to regulate the same concern differently, when the goal of good order and discipline is identical. Since there appears to be no logical basis for this, the more appropriate assumption underlying such regulation is that there is no need for different policies.

2. Analysis of Regulatory Purpose

a. Validity of Purpose. The military services require good order and discipline within their ranks. That is a fundamental tenet of military organizations because they place demands upon their members without equivalent in the civilian community.¹¹² The inherent differences in military life¹¹³ require and justify the imposition of criminal sanctions for such offenses as fraternization, even though the same conduct would not be criminal in a civilian context. The service standards, and laws set up to enforce them, must be different.¹¹⁴ A more fitting question, however, is whether the differences between

civilian and military laws are justified by differences in civilian and military society and authority. While some regulation is warranted, too much may result in a loss of respect for authority.

The purpose of fraternization regulations is straightforward, and their goals--ostensibly the preservation of the integrity of the rank structure, are valid. Fraternization raises justifiable concerns. The rank structure and the military requirement and expectation of obedience to orders¹¹ would rapidly be compromised if not nullified where the person wielding authority is the lover or best friend of the "follower."¹⁶ The mantle of command would surely crumble under such pressure; and even if it did not, all who knew of the relationship would assume that it had. This scenario describes circumstances antithetical to good order, discipline, and high morale in a unit. Therefore, this conduct is prohibited. The purpose of the regulation is well served by preventing or punishing this conduct. A much finer distinction lies in the perception of the practice of favoritism or partiality, yet this is also prohibited. The prevention of the perception of favoritism is also a valid purpose for the policy.

b. Whether Current Regulations Maintain Good Order and Discipline. The current regulations clearly maintain good order and discipline. The problem is that the means utilized to

achieve the ends far exceeds that required to achieve the valid purpose of the policy.³¹⁷ This has precluded relationships which could have no conceivable adverse impact on good order and discipline thus chilling associational rights. Highlighting the lack of uniformity in the regulations, the degree to which the purpose of the policy is exceeded spans the continuum from "not at all" in the Coast Guard, to "off the scale" in the Marine Corps. While regulatory policy need not be consistent with the Manual's definition, or even consistent among the services, the lack of a rational basis for its imposition exposes its shallow roots. It is unwise and unjust to take such liberty with the broad discretion the services have been given in this area by the courts.³¹⁸ To take this regulatory license too far risks having it pulled back well beyond the status quo, but the better argument is that it is simply not fair.

The mission of the services is ultimately the same--to win wars. Joint missions support a single standard. While one service may argue a requirement for instantaneous compliance with orders, that rationale fails for two reasons: first, no service will admit that its mission does not require prompt obedience to orders; and second, the inherent diversity of mission among units within services shatters this reasoning. For example, a Navy SEAL³¹⁹ or Army Ranger unit surely requires more discipline than

a Marine Corps administrative unit. Ultimately, all services require that orders be expeditiously obeyed. The logical conclusion is that, while fraternization regulations are valid and advance a legitimate military goal, there is no need for substantially different regulations among the services, regardless of their customs and traditions. Historical custom and tradition underlying fraternization regulations were based on social and class distinctions--a basis now thoroughly repudiated, yet at the same time alive and well.¹²⁰ Where the application of a regulation so drastically exceeds its legitimate purpose, it should be trimmed back to the point where it will accomplish its perceived need and no more. To go overboard, as the services have done, begs for legislative and judicial intervention.¹²¹ More significantly, the services would be wise to remember that the impetus for the UCMJ was widespread dissatisfaction with the overall state of military justice. Similarly, widespread discontent with the fraternization regulations may force the same type of result; indeed, congressional intervention looms large on the horizon. The Coast Guard regulation is the only one which is not only accurately based on its custom,¹²² but also accomplishes the minimal needs of the policy, and nothing more. As such, it provides excellent guidance for a DOD standard.

C. Can the Services Justify Different Standards for
Fraternization?

Not surprisingly, the separate missions, customs, and traditions of the services have resulted in significant differences among them. Some are superficial, such as the acronyms used, their celebrations and "war stories." Others are more visible, such as the wearing of different uniforms, grooming standards, height, weight, and physical fitness standards. These differences are purportedly based upon mission. The Marine Corps regulations are acknowledged to be the strictest. Yet no one cries foul. There are many reasons for this; chief among them is that none of these issues are handled criminally for those not making the grade.¹²³ Additionally, these requirements do not facially implicate a constitutional right such as the right to freedom of association. Finally, the requirements listed above are generally known to people before they join the service. Thus, no one has any problem with seeing a chubby Marine discharged for failure to meet appearance or height/weight standards while an airman of considerably greater bulk continues to serve. The focus is on the relationship of the standard to the mission of the service. Since the Marine Corps trains all Marines as riflemen first, the disparate treatment is justified. Yet it is an easy justification to sell, for there is no corresponding burden on the

individual--indeed, one might argue that the individual actually receives a benefit due to the greater pride he is able to take in his service. Applying this same rationale to fraternization regulations does not work. The burdens on the individual range from a significant reduction in his freedom of association to potential imposition of criminal penalties. And it is doubtful that many Marines take great pride in their service's strict fraternization policy. The author does not.

D. Fraternization as an Emotional Issue

Fraternization stands tall among American military offenses as having taken on a character of its own. Violations are treated far more harshly than the conduct itself actually merits.¹²⁴ The vast majority of these cases are mutually consensual, non-deviate, sexual relationships which occur in private. For this otherwise lawful conduct, the careers of many fine officers and noncommissioned officers are terminated.

For comparison, another hypothetical is helpful. Imagine a commander of a unit who is a bigot. Assume the evidence to this effect is overwhelming--he even admits to it. This commander has several officers on his staff and he routinely marks down the minority officers on their evaluations for no articulable reason. He even relieved one without cause. This conduct is unquestionably outrageous, prejudicial to good order and

discipline, and unbecoming an officer and a gentleman. It is horrendous leadership and contrary to social policy. But not only is this officer unlikely to be court-martialed,¹²⁵ his actions are not generally considered criminal.¹²⁶ Most likely, he would be relieved of command. Yet his conduct was far more pernicious and insidious than a mere consensual sexual relationship, for there can be no excuse for discrimination. In the case of fraternization, at least the underlying physical attraction provides a basic explanation, although not a justification. The fraternization offense is strictly malum prohibitum, while discrimination is malum in se. Where is the justification for the disparity in disposition of such cases?

Another example involves sexual harassment. With its nonconsensual overtones it seems to be a greater offense than fraternization, yet rarely are such cases prosecuted.¹²⁷

E. The Need for Standardized Policy on Fraternization

The issue of the services going beyond the valid requirements and purposes of a policy to carry out their own respective agendas raises troubling questions and concerns. The Marine Corps is particularly susceptible to this criticism, for application of their ambiguous policy appears to aggressively go beyond the terms of the regulation into areas not specifically contemplated by it--such as prohibiting a relationship between a

Marine officer and an Army enlisted person,³²⁸ not connected in any significant military manner. The confusion created by different regulations justify a standard policy promulgated through a DOD regulation.³²⁹

VI. ATTEMPTS TO REVISE FRATERNIZATION POLICY FROM WORLD WAR II TO
THE PRESENT

A. The Doolittle Board³³⁰

Lieutenant General James H. Doolittle was appointed to lead a six-man commission to study the current state of relations between officers and enlisted men. This Board constituted the most well known and formalized attempt to revise fraternization policy.³³¹

1. Impetus and Scope

Many returning World War II veterans voiced complaints about "lack of democracy,"³³² instances of incompetent leadership, and abuse of privileges.³³³ The Board considered all these complaints, along with civilian viewpoints, letters, articles, and even radio commentary. The Board considered whether enlisted men were treated differently than officers in three primary areas: (a) statute, (b) regulations, and (c) custom and tradition.³³⁴ Such indignities were pervasive and included signs posted prominently proclaiming, "off limits to enlisted men." Times have changed, indeed, and while officers clubs are generally still off limits to enlisted personnel, the justification is more humane.

2. Conclusions

The key conclusions, most relevant to the issue of fraternization,³³⁵ were:

(1) That Americans look askance at any system which grants "unearned privileges" to a class, and find arbitrary social distinctions between any two parts of the Army "distasteful."¹³⁶

(2) One of the main causes of poor relations between commissioned and enlisted personnel was "a system that permits and encourages a wide official and social gap between commissioned and enlisted personnel."¹³⁷

(3) That the Army must develop and inculcate a "new philosophy in the military order" which would permit "full recognition of the dignities of man."¹³⁸

3. Recommendations

In light of the above findings, the Board made the following recommendations:¹³⁹

(1) That all military personnel be allowed, when off duty, to pursue normal social patterns comparable to our democratic way of life.

(2) That the use of discriminatory references, such as "officers and their ladies; enlisted men and their wives," be eliminated from directives and publications issued in military establishments.

(3) That the hand salute be abandoned off Army installations and off duty.¹⁴⁰

(4) The abolition of all regulations, statutes, customs and traditions which discourage or forbid social associations of soldiers of similar likes and tastes, because of military rank. (emphasis added)

4. Impact of the Recommendations

While many of the Board's recommendations were adopted, those dealing with the issue of fraternization were largely ignored.

5. Analysis of the Recommendations

The Board's recommendations retain their urgency and meaning today. The recommendations draw a sharp distinction between on and off duty, and clearly endorse a liberal fraternization policy when off duty and off base. The recommendations echo the policies of foreign military services discussed earlier, and imply that no loss of discipline or control would result from adopting the Board's recommendations.

B. Congressional Rumblings on Fraternization

The earliest detected concerns from Congress on the different fraternization policies of the services coupled with an oblique hint at a standard policy occurred in the Hearings on Women in the Military.¹⁴¹ During these hearings, the following discussion occurred:

[Congressman] WHITE. I really think the DOD ought to present to Congress some kind of [specific and uniform fraternization policy]. Every day--not every day, frequently, I have some member contact me because someone is wrestling with two officers or officer and enlisted man problem as to fraternization. There are as many results or policies as there are incidents. I feel this is very destructive to morale. You are losing good officers and men and enlisted

women and women officers, I am sure, as a result of not having a clear position.

When I say you, I am talking about the Department of Defense.

MR. CLARK [Army spokesman]. I am not aware, frankly, that we have any degree of dissatisfaction about that policy. I am fully aware of the one incident, of course. We simply should not judge a policy by one incident.

[Congressman] WHITE. I suggest a lot of people are winging at the problem right now, not addressing it, hoping it might go away, but it is not going to.¹⁴²

Congressman White's words were quite prophetic for the problem has intensified. His suggestion was not taken seriously by the Army, nor was it picked up by anyone else. Thus, a decade passed before this idea was raised again. The Congressman may prove to be a modern Cassandra.

C. Congressional Resolution on Fraternization

In 1988, Representative Byron introduced specific legislation calling for a DOD fraternization policy.¹⁴³ The thrust of the legislation was that the current regulations are out of step with "a modern and sexually integrated military." Specifically noted, although without reference to the UCMJ, was that a uniform policy is lacking, and the very reason that one is required is to enforce good order, discipline, and high morale. The key point of the proposal was that the current regulations are unrealistic, because "an outright prohibition on fraternization between members of the armed forces is not feasible in a sexually

integrated military." The proposed bill directs the Secretary of Defense to conduct a comprehensive review of fraternization policies in the military services.¹⁴⁴

D. Subsequent Department of Defense Action

Wasting little time upon Congressional interest in fraternization, the office of the Assistant Secretary of Defense for Force Management and Personnel noted that, "without a standard DOD definition, regulation, and specific policy guidance, confusion and disagreement will continue to exist as to what constitutes fraternization--and when a relationship is inappropriate."¹⁴⁵ The goal was to "develop a policy and directive on fraternization which will include a standard definition and examples of acceptable and unacceptable relationships."¹⁴⁶

A working group was appointed to work towards this goal, with representation from the offices of the Assistant Secretary of Defense, DOD General Counsel, and individual services. The working group met to provide recommendations on whether DOD should promulgate a policy on fraternization. In a rather perfunctory report, the group rehashed the Article 134 language on fraternization. They noted that missions, customs, and traditions differ among the services, and therefore different fraternization regulations have resulted, tailored to the mission of each

service. One example given was that of different dress standards which exist between services. The group was unanimous in its agreement that the services could better educate their members on fraternization and the applicable policy. But they also agreed that a DOD policy was unnecessary and potentially counterproductive. Their reasoning in arriving at this conclusion revealed their predisposition to nix a DOD standard. In spite of the working group's claims that a DOD standard would have to be vague,¹⁴⁷ DOD could establish any policy they deemed appropriate, and it could be as specific as desired.

E. Service Opposition to a DOD Policy

Service representatives to the working group communicated their services' fervent desire to maintain the status quo, and vigorously resisted imposition of a DOD policy. Because this issue is still open, obtaining access to materials was extremely difficult. The fact that all services oppose a DOD policy is clear.¹⁴⁸ Only the Marine Corps and Army positions on this issue¹⁴⁹ were obtainable.

1. U.S. Marine Corps Position

The Marine Corps supports the existing approach of individual service regulations¹⁵⁰ utilizing the customs of each service as the appropriate standard.¹⁵¹ The Marine Corps admits to complaints caused by their regulation's lack of "definitive"

guidance and "broad mandate." Also included was a tangential reference to past attempts to formalize the policy with specific "do's and don'ts" which were "unsuccessful," although the reader is not told why, or what the prohibitions were. Ultimately, bureaucratic steadfastness and turf protection stand out as the primary reason for their argument against a DOD standard.¹¹² Once again, the word "infinite" is used to attempt to falsely illustrate the supposed futility of drafting a more "rigid" set of rules. This underscores the unspoken fear of the Corps that any new standard would be more "flexible." Thus, official Marine Corps pronouncements continue to indicate a profound satisfaction with the status quo.¹¹³

Finally, the Corps defends its regulation as viable based on its ability to survive judicial scrutiny.¹¹⁴ Given that the courts uphold virtually all military restrictions,¹¹⁵ this is no great achievement, and it does not mean that the regulation is fair, necessary, or that it is the best way to accomplish the actual purpose it was intended to serve.

2. U.S. Army Position

The Army was also quite satisfied with its policy on fraternization, and did not favor a DOD policy. The Army JAGs had staff cognizance of this issue and opposed any changes in policy.¹¹⁶ A draft memorandum for the Deputy Assistant Secretary

of Defense also opposed a DOD policy.³⁵⁷ While maintaining its opposition to a DOD policy on fraternization, the Army presented its own version of a DOD policy, very similar to their own.³⁵⁸

3. Secretary of Defense Reaction

While the services had hoped that united opposition to a DOD policy would obviate the need for one, the Secretary of Defense did not concur.³⁵⁹ In fact, the issue is very much alive.³⁶⁰ A draft regulation has been prepared,³⁶¹ but is woefully inadequate. It fails to address relationships between personnel of different services, chain of command issues, trainer-trainee issues, and a host of other critical matters. The term fraternization is neither defined nor used. Inappropriate relationships are defined more broadly than intended.³⁶² Clearly, they have a long way to go on this issue, but it will almost certainly be addressed in the 102nd Congress.³⁶³ Currently, DOD hopes to publish its guidance on fraternization in September 1991.³⁶⁴ Currently, DOD appears caught between the congressional pressure to regulate fraternization (or to deregulate it since the resolution implies liberalizing the rules) and the service opposition to DOD intervention. The politically acceptable result may be a bland regulation that changes nothing. Their proposal reflects as much. The current focus of their inquiries illustrates that their desire is more to maintain the

status quo than to craft a meritorious policy. For example, one policy issue under consideration is whether it is "possible to convince Congress that differences in fraternization policy and enforcement among the Services are appropriate?"¹⁶⁵ This question essentially assumes the inappropriate nature of the current system, yet seeks to justify it.

The DOD working group has noted some consistencies in the policies,¹⁶⁶ but they are insignificant. Yet events continue to conspire to mandate a DOD policy. A recent Washington Post article detailed significant problems with fraternization at the Naval Training Center in Orlando, Florida.¹⁶⁷ Recent news accounts indicate that fraternization is alive and well in Saudi Arabia.¹⁶⁸ This issue will not disappear. It is easy to anticipate that the chorus of voices calling for DOD regulation of this issue will only grow louder. Still, this is no assurance of an adequate policy being promulgated. Alternatives may be considered acceptable.¹⁶⁹ Regardless, the DOD study of the issue will undoubtedly provide the impetus for significant, if gradual, change. Perhaps the greatest accomplishment has been the compilation of additional statistics from the services on cases of fraternization¹⁷⁰ and comparison of service policies.¹⁷¹

VIII. THE NEED FOR A DOD STANDARD¹⁷²

A. The Failure of Custom-Based Fraternization Regulations

Custom provides a shaky footing for criminal regulations, and is the root cause of pervasive vagueness.¹⁷³ This is primarily due to its constantly fluctuating definition. Unfortunately, only the most egregious cases of fraternization have been reviewed.¹⁷⁴ Weaker cases with weaker facts will ultimately focus more attention on the regulations.¹⁷⁵ Sooner or later, an officer will not accept the destruction of his career for a mere indiscretion and the case will result in a trial rather than a bad fitness report or nonjudicial punishment.

When criminal standards are allowed to rest on the quicksand of custom, the way people act at a given time, by definition in the past, sets the standard for conduct. Far preferable would be a normative standard, independent of custom. "Bright line" standards in the area of fraternization have been zealously avoided, leaving the current amalgam of regulations. The failure to adequately enunciate bright line rules has led to regulations which are perhaps the most widely disregarded in the military.¹⁷⁶ A regulation which is so blatantly ignored or broken does more to diminish good order and discipline than it does to further it. The military requires a standard which is clear, cognizable, ethical, fair, and which above all can be explained as having a

rational basis. The current rationale for fraternization regulations is the need to maintain good order and discipline. This rationale need not change, even with a significant relaxation of current policy. New policy must recognize that fraternization outside the chain of command is neither prejudicial to good order and discipline or service discrediting. Where the government is serious about regulating conduct, "bright line" rules are usually available, in contrast to the paucity of useful guidance regarding fraternization. This is due, one might speculate, to the fact that military men have a difficult time promulgating specific regulations dealing with intimate matters such as sex, kissing, and dating. Indeed, it seems to be a most nonmilitary matter for concern. Unfortunately, general prohibitions regarding such matters lead commanders to apply their own standards ad hoc with radically different results for identical conduct. This is antithetical to good order and discipline. Such ad hoc enforcement raises the same issues of partiality and favoritism that the fraternization policies are designed to prevent.

Custom is no longer a valid standard for regulating this conduct. Development of a DOD mission-related standard is far more appropriate. Currently, the Army and Marine Corps, who share similar missions in that both are primarily ground combat forces, should have similar regulations. Likewise, the Coast Guard and

the Navy would be good candidates for similar regulations. But this is not the case. In fact, the services have radically different regulations without rational basis. Customs inevitably change.³⁷⁷ But when change attributed to custom appears as a radical metamorphosis one must wonder when it becomes either a different custom or a different concept. The notion of feudal inferiority has supposedly been supplanted with the bifurcated idea of social parity and prejudice to good order and discipline. "Customary" fraternization has evolved into a regulatory phase. The services cannot remain true to original notions of custom while steering the present course.³⁷⁸

The issue has many philosophical aspects. Those who subscribe to the maxim that military personnel are on duty twenty-four hours a day believe that a command may interfere in all aspects of a soldier's life. Fraternization is a classic issue of striking a balance along the fulcrum of command authority and individual liberty. The broader issue in a societal context concerns the conflict between America's democratic ideals and the professional military tradition, whose hallmark is domination of the individual, tempered by a paternalistic concern for his welfare.³⁷⁹ Yet, as significant changes occur in the larger society's social, legal, and moral norms, this frequently, and

properly, results in changes reflected in the treatment of military personnel.¹⁴⁰

B. Mission as a Substitute for Custom

A DOD standard should not be based on custom, but on mission. The mission should not be viewed in the narrow context of a single service, but as the mission of the military--the mission of the Department of Defense. This acknowledges that each service has such a diversity of missions that there is considerable overlap. From a DOD perspective, all services share the same mission: to win wars and defend the nation. Two factors argue for a complete restructuring of the way the problem of fraternization has been addressed. First, the services task organize and fight predominately as unified forces. Unified forces require common standards applicable to all members. Since morale is a key ingredient of good order and discipline, it deserves significant consideration. Nothing can impact more deleteriously on morale than different treatment for similar offenses. If an Army officer dates an Air Force enlisted woman and is not punished for it, while simultaneously a Navy officer receives nonjudicial punishment for dating an Air Force woman, this is bound to have an adverse impact on morale, particularly when those two officers work together on a joint staff. When other violations of the UCMJ are handled consistently,

inconsistent handling of fraternization cases protrudes like an aching digit, and legal authority for differences¹⁸¹ does not necessarily equate to good policy.

Secondly, military society, like civilian society, evolves and changes. Fraternization has undergone radical changes both conceptually and legally. Criminal prosecution of "pure" fraternization outside the chain of command is inconsistent with this evolution. Fraternization's entire purpose was changed from maintaining social/class distinctions to maintaining good order and discipline. Fraternization's viability is once again at issue. Many fear that a change in the regulations will cause a host of new problems. While this fear might be well grounded were fraternization restrictions simply abandoned, that is not the thrust of this thesis. Rather, a "purple" standard, applicable to all services, providing both clear guidelines and reasonable restrictions, is precisely what is required to restore fairness and reason to this area so fraught with emotion.¹⁸²

C. Structuring the DOD Regulation

In determining a standard applicable to all services, minimal credence need be given to current regulations, for the goal is not compromise but fairness. Also, a standard which allows dating but prohibits sexual intercourse¹⁸³ authorizes the conduct which naturally leads to the prohibited act, and is

therefore untenable. The standard must be narrowly drawn in regard to its criminal applicability. For example, only chain of command, superior-subordinate relationships, or cases where influence is feasible or attempted should be dealt with criminally. It should also provide specific guidance and "bright line" rules for commanders and their subordinates to apply. The DOD regulation must address relationships involving a significant rank disparity, yet do so unobtrusively and without imposing social distinctions. It must prevent amorous relationships immediately upon the termination of superior-subordinate working relationships so that superiors do not begin courting subordinates just prior to their detachment from the unit.

Another issue which must be addressed in a DOD regulation is to what extent the services may police fraternization violations not specifically countenanced in the regulation, through administrative means.³⁸⁴ Fundamental fairness dictates that administrative sanctions not be utilized to circumvent the very purpose of the DOD regulation.³⁸⁵ Thus, where no criminal action would be appropriate, no administrative action would be permitted, either. This would provide a means for redress to personnel given unsatisfactory marks on an evaluation due solely to alleged fraternization. If the conduct is prohibited, a commander still has his entire spectrum of sanctions available.

If examined from the perspective of two servicemen, a male and a female, who are outside each other's chain of command and keep their mutually consensual, non-deviate sexual relationship completely private, the military has absolutely no business regulating this conduct. Neither respective commander of either soldier could honestly state that such a relationship has a direct, tangible, and adverse impact upon good order and discipline in his unit. Thus, it should not be regulated. This conduct is not ethically, morally, or legally wrong.

In structuring the regulation it was impossible to state the size of the unit such a regulation would pertain to.³⁸⁶ A unit could be a company which can have one hundred or 1,000, a ship with fifty or 5,000, or a hospital with one hundred or 1,000. Units are too diverse to provide numerical precision through their label alone, and while small, discrete groups may be so defined, once a unit expands to regimental size and beyond, it is unworkable conceptually. Thus, the key is to focus on the relationship and its potential impact on the unit.

D. Criticisms of a DOD Regulation

Since the proposed DOD standard allows mixed-gender relationships even in cases of significantly disparate rank so long as they are kept off-base and out of sight, a complaint might arise that this memorializes hypocrisy. This assumes that these

relationships are undesirable. If hypocrisy were to be a criticism, it would be far more valid now, since fraternization is rampant, but where it remains discreet, it is largely tolerated. Also, currently condoned officer-enlisted marriages appear far more hypocritical than liberalizing the policy. Another criticism expresses concern about hundreds of officer-enlisted marriages, a problem experienced by the Air Force with their liberal fraternization policy prior to 1990.³⁸⁷ Another worry concerns those who are in unrelated units while dating today, but could be tomorrow's superior and subordinate. This has not been an unmanageable concern in the past, nor will it be in the future. In dating relationships the senior member would simply disclose the relationship if assignment to the same unit was imminent.

Some say that if this policy were liberalized, so too should the policy on business dealings, and other policies regulating conduct between servicemembers. That argument fails to recognize that the impetus behind the change in fraternization policy is both modern social forces, large numbers of women in the service, and biological attraction.³⁸⁸ Men are, have always been, and will always be attracted to women. The proposed regulation acknowledges that fact and deals with it realistically. Officers are not driven to conduct business with enlisted men.

One of the most cogent and compelling criticisms of allowing officer-enlisted fraternization is the specter of overall declining respect for officers and officer status. While this concern is frequently espoused, the precise manifestations of this peril are never articulated. To assume that a single enlisted person's relationship with a single officer will cause her to view all other officers in a similar fashion ignores several realities that demonstrate the fallacy of this position. For example, the enlisted woman was a citizen of a democracy before she enlisted and surely knows that the people who become officers are no different than she. It is only by virtue of their role in the military that they assume authority over her. Of course, to suggest that officers are inherently superior in some way would constitute a reversion to the fully discredited class-based distinctions of yesteryear--yet, the regulations which prohibit this relationship tacitly revive this very concept. Surely an enlisted person involved in such a relationship is capable of discerning that the lack of formality and military respect is appropriate only for the relationship with the officer concerned.

Another issue regarding a relaxation of fraternization regulations is that this could pave the way for liberalizing the military policy on homosexuality,³⁸⁹ due to its similar associational aspects. This is simply not the case. The courts

have employed a completely different rationale and justification to uphold the discharge of homosexuals.³⁹⁰ In fact, homosexuality can be prosecuted under Article 125, consensual sodomy.

One thing is certain: The military is an extremely conservative and bureaucratic institution. Change occurs at a glacial pace. During the debates which raged prior to the creation of the first UCMJ, one would have thought that the entire military would have collapsed.³⁹¹ Similar criticism and fear pervades any discussion of a DOD standard on fraternization. The most frequent comments echo the UCMJ debates, claiming that liberalizing fraternization regulations would "civilianize" the military.³⁹² These fears are unfounded. A few cases have provided excellent arguments for maintaining strict regulation of fraternization.³⁹³ But even though the courts will likely continue to validate whatever the military does, including according less weight to First Amendment rights,³⁹⁴ the freedoms of privacy and association should not be abridged unnecessarily.³⁹⁵

F. Unique Twists in Fraternization Caselaw Illustrate Further Confusion

1. Expansion of Fraternization's Applicability?

In regulations of such amorphous nature, it is a predictable consequence that the meaning of fraternization will continue to be liberally applied where convenient for both courts and accused. This highlights further dangers with current regulations and adds force to the argument for a DOD standard.

a. In United States v. Cannon,³⁹⁶ the accused was a married Air Force captain. He engaged in an on-base adulterous affair with an enlisted maintenance crew chief's dependent wife. The court equated this to fraternization.³⁹⁷ At his court-martial, the accused was prosecuted for conduct unbecoming an officer and a gentleman under Article 133, UCMJ, and for violating his commanding officer's order to stay away from the dependent wife, under Article 90, UCMJ. The court made the following illuminating remarks:

Although RL [the dependent wife] was a willing participant, the airman [her husband] was clearly victimized by this crime. The impact upon the airman--his marriage, his job, and his perception of Air Force officers, was significant and foreseeable. Furthermore, while RL's nonmilitary status precludes a technical charge of fraternization, her status as the dependent wife of an airman gives this offense many of the attributes of fraternization in terms of its impact upon the military community and upon the perceived integrity of the officer corps.³⁹⁸

b. In Unger v. Ziemniak,¹⁹⁹ a female Navy lieutenant⁴⁰⁰ refused to provide a urine sample in accordance with applicable Naval regulations.⁴⁰¹ Her objection pertained to the female enlisted subordinate who was required to observe her performing this delicate procedure from 18 inches away. The accused then refused a direct verbal order from her superior to comply.⁴⁰² She refused again based on her assertion that her constitutional right to privacy was abridged, and her opinion that such direct observation by an enlisted person constituted fraternization and demeaned her status as an officer.

This case illustrates a novel view of "coercive fraternization." The court does not acknowledge her argument of the inherent impropriety and paradoxical nature of the episode in question. There is no doubt that fifty years ago, this procedure would never have been allowed. A logical conclusion is that officers have suffered a considerable erosion of the prestige they once enjoyed, and are now on an equal footing with enlisted personnel such that enlisted personnel can now supervise officers in certain circumstances. One must candidly wonder whether this is the same court which consistently upholds the validity of most fraternization regulations. The court's reasoning, in denying the validity of her argument, is as follows:

Although her pleadings are phrased in terms of fraternization, her real complaint is that, in the

hierarchical military society, it is demeaning and degrading for an officer to be observed by an enlisted person while she performs an activity that typically is performed in private.⁴⁰¹ (emphasis added)

Unfortunately, both parties have missed the real issue. Fraternization is not applicable here since this is a coerced event, orchestrated by the command, and does not involve a consensual relationship. The court, on the other hand, totally misses the mark. The accused's real complaint was not one of privacy,⁴⁰⁴ but of honor. There is, in fact, something inherently and tangibly wrong with having a subordinate watch over a superior, to ensure compliance with a regulation, if there is a factual distinction between officers and enlisted personnel. If there is not, as this case suggests, then there is no purpose in prohibiting officer-enlisted fraternization. The court goes on to make this statement, which becomes incredible if one bears the court's fraternization holdings in mind: "The armed services are sufficiently egalitarian that every person in the armed services may be required to provide a urine specimen under direct observation" (emphasis added).⁴⁰⁵ The word "egalitarian" is never found in the court's rationale upholding fraternization convictions. The court's flexible, ad hoc standard of appropriate officer-enlisted relations is most discomfiting.

Conclusion

This thesis has analyzed the many ambiguities in the different services' fraternization regulations to show not only that commanders and soldiers have nebulous standards to follow but also that the current regulatory scheme offends the purpose of the UCMJ. Although regulation of fraternization is clearly a legitimate military governmental interest, and the current regulations reasonably relate to a legitimate end, i.e., maintaining good order and discipline, the more penetrating question is whether the regulations achieve their purpose at too great a cost by exceeding legitimate objectives and allowing disparate treatment for similar conduct. A proper balance must be struck between first amendment rights and disciplinary needs, without naive appeals to maintaining the historical status quo of unduly restrictive regulations.

The practice in the civilian world and the policies of other military forces demonstrates that the only legitimate justification for regulating fraternization is a concern for maintaining the integrity and authority of the chain of command. Civilian practices also suggest that an overly broad military fraternization regulation breeds contempt among civilians for military justice, especially by permitting the personal

predilection of commanders to dictate standards of enforcement which vary wildly.

The current custom-based fraternization article contains the seeds of its own destruction. Custom is difficult to discern, and subject to varying interpretations and definitions depending on whose conduct creates the custom. Class-based fraternization was founded on artificial and antiquated social distinctions rejected by Americans since the Revolution, but masquerading in different guises ever since. Indeed, maintaining the viability of fraternization regulations has become an end in itself.

In terms of the role of law, a custom based regulation allows those whose conduct is being regulated to change the custom, albeit over time. In other words, the followers could conceivably be directing the leaders, a perversion of authority that is a direct threat to any military organization. By allowing past custom to dictate current rules the military guarantees its domination by outmoded standards. In times of rapid social change, this is a dangerous way to proceed. But even less acceptable is to set a standard not in consonance with reality and label it custom. The need for a precise DOD standard is obvious. Rather than having a reactive regulation, the military needs a normative fraternization policy that imposes clear and reasonable

standards of conduct from above, thus earning the respect and compliance of those below.

My father told me never to give an order unless I was certain it would be carried out. I wouldn't issue a no-fraternization order for all the tea in China."⁶

---General Douglas MacArthur

Endnotes

1. B. Mitchell, *Weak Link: The Feminization of the American Military* 176 (1989).
2. See Zillman and Immwinkelreid, Constitutional Rights and Military Necessity: Reflections on the Society Apart, 51 Notre Dame L. Rev 396, 436 (1976).

The military must remember that, although in many respects it will remain a society apart, the men and women filling its ranks are members of American society and therefore generally entitled to exercise the same civil liberties they have sworn to defend with their lives.
3. See generally, J. Holm, *Women in the Military, An Unfinished Revolution* (1982); Mitchell, supra note 1.
4. See Mitchell, supra note 1, at 36.
5. Americans refuse to tolerate class distinctions in a much broader sense. For example, distinctions based on race, gender, age, and religion are subject to constitutional scrutiny. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
6. The Coast Guard regulations are considered, because even though that service is in the Department of Transportation in peacetime, it attaches to the Department of Defense in time of war.
7. 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ].

8. "Purple" is the term used to denote joint or multiservice activities. One who wears a "purple suit" is said to have no loyalty to any particular service. This is viewed as a positive attribute to eliminate bureaucratic infighting. A "purple standard" would apply to all services.
9. Report, Office of the Assistant Secretary of Defense (Force Management and Personnel), undated Working Group Report on Fraternization.
10. Fraternization is gender-neutral in that no greater onus of compliance or punishment is specifically or intentionally placed upon males or females.
11. Admire, Fraternization, Marine Corps Gazette, March 1984, at 63. The author discusses "that distinct difference between the fraternal emotions of camaraderie, and the sexual emotions of many male-female relationships." This is not to say that fraternization is exclusively a mixed gender issue, but it is much more likely to be so. Most current fraternization cases involve sexual escapades.
12. Since nearly all personnel in the services are "of age" for purposes of exemption from statutory rape issues, the thesis does not address this issue. No military cases raise the issue of statutory rape in the context of fraternization.

13. Sexual harassment is the most closely related offense, which, by definition, implies elements of non-voluntariness from one party. The concept of implied non-voluntariness (lack of effective consent) will be briefly touched on in relation to student-faculty and patient-therapist relationships. In a military context, the analogue would be a recruit-drill instructor relationship.
14. *Kinsella v. Krueger*, 351 U.S. 470, 485 (1955).
15. For a superb and complete history of fraternization, with extensive citations and documentation, see Carter, Fraternization, 113 Mil. L. Rev. 61 (1986). In presenting the brief history to provide the reader with a historical backdrop, the author relied heavily upon this article.
16. See A. Stradling, *Customs of the Service* (1948).
17. One regulation prohibited service in a unit as a captain or any lower rank where one had previously served in that command as a tribune in order to avoid the loss of discipline that was viewed as a necessary consequence of undue familiarity. B. Ayala, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline* 175, 180 (Douay 1582) (J. Bate trans. 1912). Note that this "novel" view of the concept disappears only to be revived circa 1945.

18. See Letter, Dep't of Army No. 600-84-2, DAPE-HRL (M),
subject: Fraternization and Regulatory Policy Regarding
Relationships Between Members of Different Ranks, 23 Nov.
1984; S. Rose, The Military Offense of Wrongful
Fraternization--Updating an Old Custom (April 1983)
(unpublished paper presented to The Judge Advocate General's
School, U.S. Army, Charlottesville, Virginia).
19. M. Janowitz, Sociology and the Military Establishment 26
(1959).
20. J. Winthrop, Military Laws and Precedent 907-18 (2d ed.
1920).
21. Hemmer, Violation of the Military Superior-Subordinate
Relationship Is a Crime! Isn't It? (April 1973)
(unpublished paper presented to The Judge Advocate General's
School, U.S. Army, Charlottesville, Virginia).
22. Id. at 9.
23. Id.
24. A. Vagts, A History of Militarism 39 (1937). An example of
this social divide is written into the Saxon-Polish Field
Service Rules of 1752:

For the officer, honor is reserved, for the
common man, obedience and loyalty . . . From honor
flows intrepidity and equanimity in danger, zeal to
win, ability and experience, respect for superiors,
modesty towards one's equals, condescension toward
inferiors, severity against criminals . . . Nothing

therefore must incite the officers but honor which carries its own recompense; but the soldier is driven and restrained and educated to discipline by reward and fear . . . The worst soldier is an officer without honor, a common man without discipline.

Id. at 74-5, n.27 (emphasis added).

25. Hemmer, supra note 21, at 10.

26. Id.

27. British Articles of War of 1774, § 15, art. 23:

Whatsoever Commissioned Officer shall be convicted before a General Court-Martial of behaving in a scandalous infamous manner, such as is unbecoming the character of an Officer and a Gentleman shall be discharged from our Service.

28. Id. at § 20, art. 3.

All crimes not capital and all Disorders and Neglects which Officers and Soldiers may be guilty of to the Prejudice of Good Order and Military Discipline, thus, not mentioned in the above Articles of War are to be taken cognizance of by a General or Regimental Court-Martial, according to the Nature and Degree of the Offense, and be punished at their discretion.

29. Fraternization was a radically different concept in early America. There were no women in the military, so fraternization between the sexes was unheard of.

30. C. James, A Collection of the Charges, Opinions, and Sentences of General Courts-Martial (1820).

31. Id. at 36-39.

32. Id. at 238-40.

33. Id. at 315-17.
34. Id. at 121-22.
35. Id. at 392-93.
36. Id. at 375-76.
37. Interestingly, a regulation prohibiting purely associational behavior existed in the original American Articles of War. Article 4 provided that it would be considered "scandalous" for any officer to associate with an officer dismissed for "cowardice or fraud." No one was ever disciplined for a violation of this Article. W. Winthrop, *Military Law and Precedents* 534 (2d ed. 1920).
38. Declaration of Independence, Preamble, vol. I, U.S.C., p. xxxix (1988 ed.).
39. American Articles of War of 1776, § XIV, art. 21 is identical to the British provision, supra note 47, with only cosmetic changes. Similarly, § XVIII, art. 5 is identical to the British regulation, supra note 28, with no substantive changes.
40. Hemmer, supra note 21, at 11-12.
41. See Carter, supra note 15, at 68, n.44. Again, the author presents an in-depth look at case law in this area.
42. Gen. Orders (no numbers), Adjutant and Inspector General's

Office (22 Apr. 1815) (MG acquitted of intoxication in front of his soldiers).

43. Gen. Orders No. 209, War Dep't (7 Jul. 1863).
44. Gen. Orders No. 261, War Dep't (1 Aug. 1863).
45. Gen. Court-Martial Order No. 100, War Dep't (16 May 1864).
46. For example, Gen. Orders (no numbers), War Dep't (2 Jan. 1810), 2LT convicted of playing cards with an enlisted "servant"; Gen. Orders No. 10, HQ, Dep't of Army (1825), LT convicted of compromising his position as a commissioned officer by going on a fishing trip with men of his garrison; and Gen. Orders No. 37, Adjutant General's Office (31 Jul. 1827) (found not guilty), LT in the "almost daily habit of living or feeding" upon company rations in the company messroom "thereby lessening his dignity and character as an officer."
47. The following thoughts convey the message quite well:

There is absolutely no point of social contact between the soldier . . . and the officer. Officers who consort with enlisted men now are tried by General Court-Martial for having done an almost unspeakable thing . . . Aside from the social distinction between the white and colored races, the Army is the only institution in the United States that is so completely a caste institution. It is an anomaly among our institutions.

F. Johnson, Discipline, The New Republic 280, 281 (July 2, 1919).

48. Women began to appear in fraternization caselaw at this time, as they entered the ranks in large numbers. A particularly noteworthy case was United States v. Futrell, 47 B.R. 339 (1945), where a Womens Army Corps (WAC) CPT allowed Navy enlisted men into her BOQ room and drank liquor with them. This conviction of "interservice fraternization" not even discussed in the case, was clearly based upon the social/class distinction. See also United States v. Hooey, 27 B.R. 5 (1943) (LT took enlisted WAC into officer's quarters); United States v. Porter, 39 B.R. 49 (1944) (LT wrote to enlisted WAC requesting to perform cunnilingus); United States v. Ochs, 40 B.R. 339 (1944) (WAC LT cohabited with single enlisted man); United States v. Clark, 2 B.R. (A-P) 343 (1945) (two LTs kissed two enlisted women in a truck in view of enlisted men).
49. Not only did the concept of fraternization expand to include American servicewomen, but it also grew to include enemy women. When American forces occupied Germany romance and sexual liaisons between U.S. soldiers and German frauleins, while common, were frowned upon. See United States v.

Flackman, 10 B.R. (ETO) 225 (A.B.R. 1945); United States v. Wilson, 30 B.R. (ETO) 75 (A.B.R. 1945).

50. M. Treadwell, The Women's Army Corps (1954). This text provides an excellent overview of the legal, social, and moral problems encountered at the time.
51. See generally, Holm, supra note 3.
52. See generally, United States v. Wilson, 32 C.M.R. 517 (A.B.R. 1962); United States v. Berry, 20 C.M.R. 325 (C.M.A. 1956); United States v. Snyder, 4 C.M.R. 15 (C.M.A. 1952).
53. See Winthrop, supra note 42, at 716. See also Peyton, A Comprehensive Course in Military Discipline and Courtesy, U.S. Army Pam. D-2 (1921), quoting MG David C. Shanks on his views, quoted in Mahoney, supra note 57, at 157:

[U]ndue familiarity between officers and enlisted men is forbidden. . . . This requirement is not founded upon any difference in culture or mental attainments. It is founded solely upon the demands of discipline. Discipline requires an immediate, loyal, cheerful compliance with the lawful orders of the superior. Experience and human nature shows that these objects cannot be readily attained when there is undue familiarity between the officer and those under his command.
54. United States v. Glover, 14 B.R. (ETO) 67 (1944). See also United States v. Long, 13 B.R. (ETO) 291 (1944).
55. See United States v. Johnston, 23 B.R. 183 (1945); United States v. Wright, 44 B.R. 183 (1945); United States v.

- Futrell, 47 B.R. 339 (1945); and United States v. Field, 21 B.R. 41 (1943).
56. 27 B.R. 385 (1943).
57. See generally, United States v. Pitasi, 44 C.M.R. 31 (C.M.A. 1971); United States v. Free, 14 C.M.R. 466 (N.B.R. 1953); United States v. Lovejoy, 41 C.M.R. 777 (N.C.M.R. 1968); and United States v. Jones, 40 B.R. 149 (1944). See also Nelson, Conduct Expected of an Officer and a Gentleman: Ambiguity, 12 A.F. JAG L. Rev. 124 (1970); Flatten, Fraternization, 10 A.F. Rep. 109 (Aug. 1981); and Carter, supra note 15, at 77.
58. Carter, supra note 15, at 76.
59. In 1945, General Eisenhower stated, "I want good sense to govern such things. Social contact between the sexes . . . that does not interfere with other officers or enlisted persons should have the rule of decency and deportment, not artificial barriers." S. Ambrose, Eisenhower, 1890-1952, 417-18 (1983). Of course, one must consider General Eisenhower's own reputation as a notorious fraternizer.
60. 41 B.R. 365 (1944).
61. Id. at 368. The court "doth protest too much."
62. 19 B.R. (ETO) 257 (1945).
63. Id. at 260.

64. Indeed, the court was not in full agreement on this issue. Judge Burrow dissented regarding the fraternization specification, stating that it failed to allege an offense. Citing Webster, he noted that fraternization means, "to associate or hold fellowship upon comradely terms," and "socially" as "marked by companionship of others." The allegations, then, accused 2LT Penick of "wrongfully being a comrade in arms which is not blameworthy, but on the contrary, precisely his duty." Id. at 261.
65. A Life magazine writer gave this evaluation: "The present officer-enlisted man relationship might fit a dictatorship but it is anathema to the citizens of a democracy." Neville, What's Wrong with Our Army? 20 Life at 104 (February 25, 1946).
66. F. Kjiezer, Military Obedience 45 (1978).
67. Id. at 46.
68. Id. at 47.
69. Manual for Courts-Martial, United States, 1984, Part IV, para. 83b [hereinafter MCM, 1984].
70. The Article 134 provisions appear in Appendix B.
71. See, e.g., United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981), petitioned denied, 13 M.J. 31 (C.M.A. 1982); United States v. Tedder, 18 M.J. 777 (N.M.C.M.R.), petition

granted, 19 M.J. 115 (C.M.A. 1984); Staton v. Froehlke, 390 F. Supp. 503 (D.D.C. 1975); United States v. Lovejoy, 42 C.M.R. 210 (C.M.A. 1970). The only successful use of this challenge was in United States v. Johanns, 20 M.J. 155 (C.M.A. 1985). See generally Cutts, Article 134: Vague or Valid, 15 A.F. JAG L. Rev. 129 (1974); Everett, Article 134, Uniform Code of Military Justice--A Study in Vagueness, 27 N.C.L. Rev. 142 (1959); Gaynor, Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article, 22 Hastings L.J. 259 (1971); Hewitt, General Article Void for Vagueness, 34 Neb. L. Rev. 529 (1958).

72. There is an obscure reference to custom under Article 92(3), MCM, 1984, dereliction of duty, stating that a duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service. Research disclosed no prosecutions based on custom. Only two cases even mention it; see United States v. Heyward, 22 M.J. 35 (C.M.A. 1986), and United States v. Pratt, 34 C.M.R. 731 (A.C.M. 1963).
73. The examples the court gives are violations of regulations, but they are clearly distinct from fraternization. Article 92, UCMJ, is used to charge violations of lawful general

orders and regulations. Thus, it is common to see regulations as to hair length, proper wearing of the uniform, etc., in this area. Fraternization frequently arises under this article where a base order prohibits certain relationships, such as between drill instructors and recruits. The problem with many of these regulations is that they are not always punitive.

74. United States v. Johanns, 20 M.J. 155, 160 (C.M.A. 1985).
75. See Appendix B.
76. United States v. Carter, 23 M.J. 683 (N.M.C.M.R. 1986) held that enlisted fraternization is punishable under Article 134, if service discrediting or prejudicial to good order and discipline, so long as adequate notice is provided to the accused. In United States v. Clarke, 25 M.J. 631 (A.C.M.R. 1987), the court conceded that prior law in this area was cloudy, but from this point forward, noncommissioned officers were constructively on notice that fraternizing with an enlisted subordinate was punishable under Article 134. See also individual service regulations in Appendix D.
77. The case of United States v. Lowery, 21 M.J. 998, 1000 (A.C.M.R. 1986) raises the unique prospect of "instant custom," based on the fact that the new 1984 Manual

specifically countenanced the offense of fraternization for the first time. The court stated that, "This custom has long existed in the Army, but assuming arguendo that it did not, it was instantaneously created on 1 August 1984 when the new Manual became effective." Colonel Mahoney, in his article on fraternization, states that the opposite could also be true: "By proscribing fraternization contrary to service customs, the President eradicated these service customs against fraternization, fixing them in time, on 1 August 1984, as mere definitions of the offense of fraternization in each service." Mahoney, Fraternization: Military Anachronism or Leadership Challenge? 28 A.F. L. Rev. 153, 156 n.14 (1988).

78. In *United States v. Free*, 14 C.M.R. 466, 470 (N.B.R. 1953) the court stated the difficulty of defining the term:

The problem presented to us is to draw a line as to where acts of fraternization or association with enlisted men by officers cease to be the innocent acts of comradeship and normal social intercourse between members of a democratic military force and become a violation of Article 134 of the Code, prejudicial to good order and discipline in the armed services of the United States.

And then the court provided what is now the most widely quoted definition:

Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person, experienced in the problems of military leadership, to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.

Id.

79. See United States v. Wales, 31 M.J. 301, 304 (C.M.A. 1990), where the government was sure to elicit from a betrayed husband that he had lost all his respect for the officer accused, and some respect for officers in general.
80. The history of the offense of fraternization, coupled with the evolution of the UCMJ, is a fertile area for research and writing. It is astounding that it took until 1984 to create the specifically enumerated offense of fraternization. When looking at the genesis of the initial UCMJ--the legislative history--extensive writings and law review articles provide sufficient material for in-depth study. This is unfortunately not the case with the 1984 Manual, for which there are virtually no research materials available to delve into the creation of the fraternization offense. Since nothing was available in writing, the author arranged a telephone interview with Colonel John S. Cooke, JAGC, USA (13 November 1990). COL Cooke was secretary to

the Joint Service Committee for the revision of the 1984 Manual, and also served as the Chairman of the working group. In this latter capacity he served as custodian of all paperwork produced by the committees. Fraternization was one of numerous issues addressed by the committee. No legislative history of the new fraternization article is available since this is not a congressional product. The Manual was signed by the President. Since the President had not seen the notes, the committee did not feel it would be fair to keep them available for public inspection, so they were destroyed. The explanation section of the offense provides a summary of the group's thought processes, reasoning, and intent.

81. In the late 1940s the old Articles of War and the Navy's "Rocks and Shoals" were vulnerable to substantial change, if for no other reason than their age. With the end of World War II and in the rush of returning servicemen to make up for the war years it was quite expectable that voices would be heard from those who suffered some disability at the hands of the military justice system, those in restraint or beclouded by a discharge under other than honorable conditions. There was sufficient factual material to fan the flames of discontent, not only from those suffering a detriment as a result of service legal process but from others concerned in [sic] improving the system of military law, persons desiring a more modern military justice system, more attuned to concepts also beginning to be heard in regard to civilian criminal procedures.

- Westmoreland and Prugh, Judges in Command: The Judicialized Uniform Code of Military Justice in Combat, 3 Harv. J. L. & Pub. Pol'y 1 (1980).
82. Wallstein, The Revision of the Army Court-Martial System, 48 Colum. L. Rev. 221 (1948); describes the major concerns as command influence; lack of lawyer involvement at courts-martial, especially lack of legally trained representation for the accused; enlisted representation at courts-martial; and excessively lenient treatment for offenses committed by officers. See also, Royall, Revision of the Military Justice Process as Proposed by the War Department, 33 Va. L. Rev. 269 (1947).
83. See Holtzoff, Administration of Justice in the United States Army, 22 N.Y.U.L. Q. Rev. 1 (1947); Morgan, The Background of the Code, 6 Vand. L. Rev. 169 (1953).
84. Klein, JAG Justice Today, 8 Cath. U. L. Rev. 2 (1959). This article provides an overview of many military law issues of that day.
85. H.R. Rep. No. 2722, 79th Cong., 2d Sess. 1 (1946).
86. S. Rep. No. 903, 80th Cong., 1st Sess. 7 (1947), and H.R. Rep. No. 2575, 80th Cong., 1st Sess. 4 (1947).
87. Military justice, in fact, required significant revision. Punishments were stiff, and justice swift; too swift. For

an excellent overview of these issues see Cox, The Army, the Courts, and the Constitution: The Evolution of Military Justice, 118 Mil. L. Rev. 1 (1987); E. Byrne, Military Law (3rd ed. 1981); Van de Water, Panic Rides the High Seas, 12 Am. Heritage 20 (June 1961); E. Coffman, The Old Army: A Portrait of the American Army in Peacetime, 1784-1898 (1986).

88. Report of the McGuire Comm. to the Sec'y of the Navy (1945).
89. S. Rep. No. 1338 (starred version), 80th Cong., 1st Sess. (1947), and H.R. Rep. No. 3687, 80th Cong., 1st Sess. (1947).
90. H.R. Rep. No. 343, 80th Cong., 1st Sess., 61 Stat. 495. Act of July 26, 1947.
91. The imposition of the UCMJ had the greatest impact on the Navy, which had not revised its Articles for the Government of the Navy since 1928. The Army and Air Force (Army Air Corps) had been governed by the Articles of War, 41 Stat. 787 et seq. (1920), 10 U.S.C.A. secs. 1471 et seq. (Supp. 1951), and these had been amended continuously prior to the enactment of the UCMJ. Thus, the UCMJ was based more upon the Army system of justice than the Navy's.
92. See Klein, supra note 84, at 60.

93. Forrestal, House Subcommittee Hearings, U.S. Congress, House Committee on Armed Services, Uniform Code of Military Justice, H.R. Rep. No. 491, 81st Cong., 1st Sess. 596 (1949), to accompany H.R. Rep. 4080.
94. Id. This term indicated a goal. It in no way implied or was understood to be the name of the new code that would ultimately be created.
95. Act of May 5, 1950, 64 Stat. 108 (50 U.S.C. 551-736). This was codified and enacted into law as Title 10 of the United States Code, which was titled Armed Forces Act of August 10, 1956 (Public Law 1028, C. 1041, 84th Cong., 2d Sess. 70A Stat. 36). While there is no historical support for the basis of the name of this new code, one may assume the drafters knew what a radical departure they were making from established military justice, especially for the Department of the Navy.
96. H.R. Rep. No. 491, 81st Cong., 1st Sess. 1 (1949). The report states that, "Among the provisions designed to secure uniformity are the following: (1) The offenses made punishable by the Code are identical for all armed forces" (emphasis added).
97. See H.R. Rep. No. 481, 81st Cong., 1st Sess. 52 (1949),

stressing the purpose of the UCMJ as being "uniformly applicable" to all services.

98. Article 2, UCMJ, covering persons subject to this chapter, begins with "members of a regular component of the armed forces . . . wherever they serve."
99. Article 5 ensures that the UCMJ will have uniform territorial application by simply stating, "this chapter applies in all places."
100. Certainly there is no supportable reason why any one of our armed forces should have a brand of justice inferior to that of the other. Nor should there be any substantial differences, unless clearly required by corresponding differences in function, organization, or deployment of one of the services. Justice is not, according to American standards at least, justice at all unless it is equal justice.
- Ward, UCMJ--Does It Work? 6 Vand. L. Rev. 2, 4 (1953).
101. See generally Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense (1949). This is widely referred to as the Morgan Report; and see H.R. Rep. No. 491, 81st Cong., 1st Sess. (1949); Sen. Rep. No. 486, 81st Cong., 1st Sess (1949).
102. The protection of individual human rights is more than ever a central issue within our society today . . . Military as well as civilian law is dynamic and of necessity must change to fit the needs of a changing society.

Westmoreland, Military Justice--A Commander's Viewpoint, 10
Am. Crim. L. Rev. 5 (1971).

103. Crump, History of Military Justice, 17 A.F.L. Rev. 55
(1975).
104. The following typifies civilian reaction to military justice
decisions they cannot understand: "None of the travesties
of justice perpetrated under the UCMJ is really very
surprising, for military law has always been and continues
to be primarily an instrument of discipline, not justice."
Glasser, Justice and Captain Levy, 12 Colum. Forum 46, 49
(1969).
105. Several cases have been considered at the Circuit Court
level involving associational issues that approximate
fraternization. See Hollenbaugh v. Carnegie Free Library,
436 F. Supp. 1328 (1977), aff'd mem., 578 F.2d 1374 (3d
Cir.), cert. denied, 439 U.S. 1052 (1978) (two library
employees fired for living together in "open adultery");
Lomans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1971)
(alleged violation of equal protection by discouraging
association between married and unmarried high school
students); Chem Fab Corporation, 27 NLRB 996 (1981) (rule
prohibiting fraternization between workers in two plants
during working hours held not unlawful--enforced in 691 F.2d

1252 (8th Cir. 1982) (many other types of associations may be prohibited by standards of conduct regulations)).

106. See generally Jamison, Managing Sexual Attraction in the Workplace, 28 Personnel Ad. 45 (1983) (considers the problems which may arise from perceived preferences to employees due to relationships with managers).
107. Perhaps the most well publicized case of civilian fraternization involved Mary Cunningham dating the President of the Bendix Corporation, William Agee. When she was appointed to a high position within the company, all who knew of her relationship with Mr. Agee assumed that was the reason she attained the appointment.
108. Doe v. Swift, No. 87-1312 (15 Cir. Ct. Ala. Dec. 29, 1989). See also, Gunnells, Patient-Therapist Sexual Relations: Professional Services Rendered? 14 L. & Psychology Rev. 87 (1990).
109. See Korf v. Ball State Univ., 725 F.2d 1222 (7th Cir. 1984) (tenured professor terminated for sexual advances toward students). See also Winks, Legal Implications of Sexual Contact Between Teacher and Student, 11 J.L. and Educ. 437, 459-60 (1982) (where student in sexual relationship with professor others assume she has an advantage).

110. Shawgo v. Spradlin, 701 F.2d 470 (5th Cir. 1983) (former police officers unsuccessfully sue for reinstatement after demotion and resignation due to off-duty dating and cohabitation). This case is apropos, and supports fraternization regulations in much the same way the courts uphold military regulations--a simple rational basis test--the lowest level of scrutiny.
111. The Central Conference of American Rabbis (CCAR) has recently considered a regulation prohibiting sexual relations between rabbis and counselees, spouses or partners of members of their congregation, student rabbis, or junior colleagues. This draft was recently approved by their Committee on Ethics and Appeals for inclusion in their Code of Ethics. CCAR Code of Ethics draft 9 (June 25, 1990).
112. The only exception to this general rule is that in certain jurisdictions state legislatures have begun to make it criminal for a therapist to sexually exploit a client. A new [California] law makes it a crime for a therapist to have sexual contact with a client. For a first offense, an offender would be charged with a misdemeanor. Second and following offenses may be a misdemeanor or a felony, and an offender may be fined up to \$1,000 and/or sentenced to a county jail for up to one year, or fined up to \$5,000 and/or

sentenced to state prison for up to one year. SB 1004, Chap. 795, Business and Professions Code sec. 729 (1989).

113. The term "fraternization" is generally and historically a military concept, but occasionally, the civilian sector uses this term. This thesis applies the term to similar civilian conduct. See generally Driscoll and Bova, The Sexual Side of Enterprise, Mgmt. Rev. 51 (July 1980).

114. Neese, Cochran, and Bryant, Should Your Firm Adopt an Anti-Fraternization Policy? 54 Advanced Mgmt. J. 4, 6 (Autumn 1989).

115. M. Shaw, Group Dynamics: The Psychology of Small Group Behavior 95 (1971); Collins, Managers and Lovers, Harv. Bus. Rev. (Sep.-Oct. 1983).

116. Specifically, when a love relationship exists within an organization, internal communication channels and power alliances shift. Co-workers may feel threatened by the "pillow talk" they assume the lovers are conducting. If they believe a colleague has gained access to a powerful person in the organization as a result of a love relationship, they may feel jealous. This is particularly likely if the employee has tried to win the favor of a powerful male manager by demonstrating competencies and abilities, only to watch that man fall in love with and devote his attention to a female colleague. . . . Our findings suggest that overt sexual behavior and business do not mix. They indicate that strong sexual attractions interfere with work.

A. Warfield, Co-Worker Romances: Impact on the Work Group

and on Career-Oriented Women 25 Personnel J. 5 (May 1987).

117. See Anderson and Hunsacker, Why There's Romancing at the Office and Why It's Everybody's Problem, 62 Personnel 57, 62 (Feb. 1985) (office romances involve perceptions of favoritism in roughly one-third of cases); Quinn and Lees, Attraction and Harassment: Dynamics of Sexual Politics in the Workplace, 13 Org. Dynamics 35, 42 (Autumn 1984); Quinn, Coping with Cupid: The Formation, Impact, and Management of Romantic Relationships in Organizations, 22 Admin. Sci. Q. 30, 42 (1977) (adverse effects of office romance include lowered productivity, gossip, distorted communications, hostilities, and damage to the reputation of the worksection). Gordon and Strobers, Bringing Women into Management 39-58 (1975).
118. See University of Iowa, Policy on Sexual Harassment and Consensual Relationships (July 28, 1986) and Letter from Harvard Dean Henry Rosovsky to the Faculty of Arts and Sciences (1983) (declares relationships between students and faculty "always wrong" if the teacher has a professional responsibility for the student). Both use the term "fundamentally asymmetric." See also Appendix A, Oklahoma University College of Law Regulations using the same term.

119. Mocking Military Justice, Los Angeles Times, May 15, 1988, at V-4. The Los Angeles Times and numerous local papers gave high profile coverage to the Marine Corps prosecution of a Navy LT who dated and then married a Marine LCPL. No chain of command relationship existed and their relationship was conducted off-base. The Times stated, "It's hard to see how such relations . . . can in any way be regarded as prejudicial to good military order." This statement was made after acknowledging the validity of punishing fraternization in the chain of command. This case so inflamed the media and the public that the Marine Corps did not prosecute. See also The Washington Post, December 25, 1978, at A9 (This article on "sex fraternization" describes the Army's losing battle against it. The article acknowledges that "It's kind of hard for the sergeant to order Mary to scrub out the latrine the next morning when they were sleeping together the night before." The article points out that many Army personnel are angry with fraternization regulations as violative of the First Amendment's guarantee of freedom of association, as well as the "laws of nature."); The Washington Post, March 7, 1978, at A5 (details cases of cadet fraternization at the U.S. Air Force Academy and U.S. Military Academy); The Washington

Times, March 1, 1990, at F1 (discusses problems with fraternization in general).

120. The following conversation occurred in a recent "Doonesbury" comic strip by Garry Trudeau:

Ray: "What? The chick's a CAPTAIN? Yo, that's fraternization, man!"
B.D.: "I know what it is, Ray . . ."
Ray: "How'd you find out, man?"
B.D.: "Over dinner. I was talking about what a royal pain the brass were . . . we suddenly realized we were on different sides of the issue. Later she told me she had just assumed I was an officer because of my age, then she broke it off!"
Ray: "So what did you do?"
B.D.: "I saluted and got dressed."
Ray: "Wicked."

121. Appendix A contains examples of university regulations.
122. Sexual harassment and sex discrimination are frequently litigated areas in their own right. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).
123. Faculty-student regulations, similar to drill instructor-recruit relationships, are viewed in a special category due to the inherent inequality of power. This inequality theoretically makes consent not fully informed and voluntary; much like statutory rape, it may be a strict liability offense.
124. That policy is identical to military interpretation of

- regulations in caselaw. See United States v. Mayfield, 21 M.J. 418 (C.M.A. 1986).
125. See United States v. Johanns, 20 M.J. 155 (C.M.A. 1985).
126. American Psychiatric Association, Ethics Newsletters, Vol. II, at 2 (April/May 1986).
127. An extremely instructive analysis, with a characteristically psychiatric bent is provided below, and is relevant in the context of the chain of command.

With many students, especially younger ones and those dependent on their teachers for learning and/or advancement, relationships may appear to be consenting and yet be very problematic. They involve, by definition, an inequality in which the student expects the teacher to be trustworthy and a model. These relationships are commonly affected by transferences similar to those developed by patients, which involve adulation for the teacher that is easily mistaken for "love" (the crush). The transference further exaggerates the participants' inequality and makes these relationships very vulnerable to acting out. Thus, in various ways, sexual activity with students, even if it appears consenting, may well constitute exploitation of an unequal relationship for the teacher's own gratification. The sexual involvement, while not harassment by strict definition, may exploit both the student's wish to be loved by the teacher, and the power the teacher has over the student: the power to give a good or bad grade, to give a good or bad reference, or to affect advancement at a particular institution or within the profession.

Psychiatrists, even more than other teachers, need to be careful not to take advantage of their students' transference, its manifestations and powers, and its management. Anything less fails the student and sets a poor model for young professionals. Indeed, a recent study of psychotherapists (psychologists) suggests that therapists who were sexually involved with their teachers/supervisors

during training years are considerably more likely to be sexually involved with their own students and "clients" than those who were not so involved.

American Psychiatric Association, Ethics Newsletter, Vol. II, No. 2, at 2 (April/May 1986).

128. American Psychological Association, On Ethical Principles of Psychologists (1987).
129. American Board of Examiners in Clinical Social Work, Code of Ethics (1988).
130. While not a burning issue in the military due to its relative infrequency, the issue of judge advocates having or attempting to have relationships with their clients has arisen. In the Judge Advocate General's Professional Responsibility Committee (U.S. Army), Professional Responsibility Opinion #90-1, the committee reviewed an Army legal assistance attorney's alleged attempt to initiate an affair with a dependent wife of an active duty enlisted soldier. When the client revealed that her husband had committed adultery and that she had not engaged in sexual relations for several months, the attorney "jokingly" suggested that the two of them should initiate an affair, and stated that she could move in with him. The attorney also embraced her at the conclusion of the meeting. The committee took a dim view of his conduct. And, using

language likely to be seen in the fraternization arena, the committee stated that "the appearance of impropriety is as devastating as the actual existence of impropriety."

131. Simply Stated, It'll Be Hands Off for These Long Arms of the Law, Wall Street Journal, November 13, 1990, at B1, col. 1.

132. The California Association of Marriage and Family Therapists offers the following regulation in its Ethical Standards of 1989:

Marriage and family therapists are cognizant of their potentially influential position with respect to patients, and they avoid exploiting the trust and dependency of such persons. Marriage and family therapists avoid dual relationships with patients that could impair their professional judgment or increase the risk of exploitation. Sexual intercourse, sexual contact or sexual intimacy with patients or a patient's spouse or partner is unethical.

133. See generally, Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 So. Cal L. Rev. 777, 854 (1988).

134. A "mixed" marriage in the military refers to an officer-enlisted marriage.

135. See Shearer, Paramour Claims under Title VII: Liability for Co-Worker/Employer Sexual Relationships, 15 Empl. Rel. L.J. 57 (Summer, 1989); discusses the current and potential impact of Title VII of the Civil Rights Act of 1964 on

office romance, and highlights section 1604.11(9) which provides:

Other related practices: where employment opportunities are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment or benefit.

See generally, Annotation, Burden of Proof Aspects of Paramour Claims, 86 A.L.R. Fed. 230 (1988). See also Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988) (female SEC attorney denied promotion after complaining of sexual harassment by supervisors); King v. Palmer, 598 F. Supp. 65 (D.D.C. 1984), Rev. 778 F.2d 878 (D.C. Cir. 1985) (D.C. jail nurse complained of younger, less qualified nurse promoted ahead of her due to her sexual intimacy with doctor who promoted her); Toscano v. Nimmo, 570 F. Supp. 1197 (D.C. Del. 1983) (woman denied promotion received by less qualified clerk who had an affair with the boss); Kersul v. Skulls Angels, Inc., 495 N.Y.S.2d 886 (Sup. Ct. Special Term 1985) (woman fired for criticizing female subordinate for having affair with company president).

136. Zillman and Immwinkelreid, Constitutional Rights and Military Necessity: Reflections on the Society Apart, 51 Notre Dame L. Rev. 386, 414 (1976). Perhaps by liberalizing

the military attitude toward fraternization but maintaining the criminal sanctions, an acceptable compromise can be reached which will provide insulation from criticism.

137. Gilligan and Wims, Civilian Justice v. Military Justice, Crim. Just., vol. 5, no. 2, at 2 (Summer, 1990). The authors quote Melvin Belli and F. Lee Bailey, who both express a preference for military courts. See also Moyer, Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant, 51 Mil. L. Rev. 1 (1971).
138. Regardless, the criminal enforcement mechanism for fraternization violations has been compared to racial separation statutes. See Zillman, supra note 136, at 412, and Adickes v. Kress and Co., 398 U.S. 144 (1970).
139. The author interviewed seven international students currently studying at The Judge Advocate General's School, U.S. Army (TJAGSA). The summaries of those interviews appear in the text.
140. Interview with Lieutenant Colonel Patrick J. McCaffrey, Office of the Judge Advocate General, Canadian Forces at TJAGSA (Jan. 15, 1991). He is a fellow member of the 39th Graduate Class at TJAGSA. His last assignment was Director of Law/Materiel-2, Ottawa, Canada. The author is extremely grateful to him for his assistance in procuring all

available Canadian regulations, cases, and background materials pertaining to the development of their fraternization policy.

141. See Mackenzie and Acreman, Women in the Combat Arms--A New Dimension to the Fraternization Threat (paper presented to the National Defence University, Canadian Forces (Jan. 1990)) (an excellent paper arguing against the new liberal policy).
142. This landmark legislation opened all positions in the Canadian Forces to women, to include combat infantry assignments. The Canadians wisely kept the infantry standards the same, so as a practical matter, very few have entered the combat arms. The Human Rights Act dramatically expanded individual rights vis á vis institutional authority. See Unclassified Memorandum MARCOM 5200-0 (DCOS PIT), subject: Fraternization, 27 Mar. 1987.
143. Id. at 1.
144. Id. at 2. "Forces wide" refers to drafting a Canadian Forces Administrative Order (CFAO), which was the final result. This would be similar to a Department of Defense (DOD) order for the U.S. military.
145. CFAO 19-38.

146. He has since been promoted to the only four star position in the Canadian Forces. The Canadian position of Chief of Staff is similar to our Chairman, Joint Chiefs of Staff.
147. Unclassified Memorandum MARCOM 5200-0 (DCOS PIT), subject: Fraternization, 27 Mar. 1987.
148. LTC McCaffrey confirmed that the regulation means what it says, as opposed to American regulations which may not be applied exactly as written.
149. Canadian Military College Regulation section 640(1) (1989).
150. The Coast Guard fraternization regulation appears in toto in Appendix B.
151. LTC McCaffrey defended their more liberal regulations, stating that "You have to trust people's good sense and professionalism."
152. CFAO 19-38 at 8.
153. LTC McCaffrey eloquently stated this ultimate truth.
154. Major Frederick Ayugi is a fellow member of the 39th Graduate Course, TJAGSA. He is one of only five judge advocates in their defense department, and they service all forces in Kenya. His last posting was at the Army's headquarters as a Staff Officer-2. He was interviewed at TJAGSA on 10 January 1991.

155. Interview with Lieutenant Colonel Andrew H. Braban, Australian Army Legal Corps, at TJAGSA (Jan. 15, 1991), where he is currently a fellow member of the 39th Graduate Class. His last billet was Staff Officer, Grade I, Administrative Law, Directorate of Army Legal Services, Canberra.
156. Interview with Major Gerard A. J. M. van Vugt, Judge Advocate General's Corps, Royal Netherlands Army, at TJAGSA (Jan. 23, 1991). He is currently a student at the 124th Basic Course at TJAGSA. He recently joined the JAG department. His last assignment was at the JAG staff of the Royal Netherlands Army at The Hague.
157. Significantly, there are no criminal sanctions against adultery, either.
158. Interview with Captain Feyiz Erdogan at TJAGSA (Jan. 11, 1991). He is a fellow member of the 39th Graduate Course. His last assignment was as a military judge, Turkish Army.
159. These regulations are called the IC Hizmet Kanunu and the IC Hizmet Yonetmeligi.
160. Interview with Captain Piyachart Jaroenpol of the Judge Advocate General's Department, Royal Thailand Army, at TJAGSA (Feb. 7, 1991). He is a fellow member of the 39th

Graduate Course. His prior billet was with the Advisory Division, JAG Department, Ministry of Defense.

161. Interview with Major Michael D. Conway, Army Legal Corps, British Army, at TJAGSA (Feb. 21, 1991). He is currently a member of the 124th Basic Course at TJAGSA. His last assignment was Staff Officer Grade 2, in the Army Law Training and Publications Branch, Army Legal Group, United Kingdom.
162. Available British military regulations revealed no article on fraternization, or even any use of the term. Major Conway confirmed this. In fact, they never prosecute fraternization cases, to his knowledge, meaning that it surely is not prevalent. Manual of Military Law, Great Britain, Ministry of Defence (1972); Manual of Air Force Law, Great Britain, 1976. (These were the most recent publications available.)
163. Other foreign military services have significantly civilianized their military justice systems in comparison to the American standard. See Sherman, Military Justice Without Military Control, 82 Yale L.J. 1398 (1973).
164. Many arguments used in the context of analyzing individual service regulations may be applicable to others but may not be repeated for brevity's sake.

165. OPNAVINST 5370.2 (6 February 1989) [hereinafter OPNAVINST].
See Appendix D.
166. Id. at 3(n).
167. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
168. An "all-hands" club is open to all ranks. One must ask why the Navy has these clubs when their policy against fraternization is so strict.
169. Colonel Flatten called fraternization, "more describeable than definable." Flatten, Fraternization, 10 A.F. Rep. 109, 112 (1981).
170. The same problems posed by different customs in the military are visible in pornography prosecutions in the wake of *Roth v. United States*, 354 U.S. 476 (1957), which applies a contemporary community standards test. Obviously, as one moves to different communities, similar conduct may vary as to its legality.
171. OPNAVINST at 2(a).
172. This article is utilized specifically for the offense of disrespect to a superior commissioned officer.
173. In fact, the Navy is the only service to ever prosecute solely for violating a custom of the service. This explains their unwillingness to part with their beloved Articles for

the Government of the Navy discussed in the historical (UCMJ) section of this thesis. The pertinent provision of those Articles follows:

Article 22, Articles for the Government of the Navy (1934 edition) provided:

(1) Offenses not specified.--All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court martial may direct.

In explaining the meaning of Article 22(a), Articles for the Government of the Navy (1934 edition), section 5 of Naval Courts and Boards (1937) (the Navy's former court-martial manual), stated:

The sources of unwritten naval law are:

- (a) Decisions of the courts.
* * * * *
- (b) Decisions of the President and the Secretary of the Navy and the opinions of the Attorney General and the Judge Advocate General of the Navy.
* * * * *
- (c) Court-martial orders.
* * * * *
- (d) Customs and usages of the service.

Circumstances from time to time arise for the government of which there are no written rules to be found. In such cases customs of the service govern. Customs of the service may be likened, in their origin and development, to the portions of the common law of England similarly established. But the custom is not to be confused with usage; the former has the force of law, the latter is merely a fact. There may be usage without custom, but there can be no custom unless accompanied by usage. Usage consists merely of the repetition of acts, while custom is created out of their repetition.

Custom.--The following are the principal conditions to be fulfilled in order to constitute a valid custom:

- (1) It must be long continued.
- (2) It must be certain and uniform.
- (3) It must be compulsory.
- (4) It must be consistent.
- (5) It must be general.
- (6) It must be known.
- (7) It must not be in opposition to the terms and provisions of a statute or lawful regulation or order.

As usage constantly observed for a long period results in the establishment of a custom, so long-continued nonusage will operate to destroy a particular custom, that is, to deprive it of its obligatory character.

The field of operation of the unwritten naval law is extensive. It is applied in defining certain offenses against naval law and in determining whether certain acts or omissions are punishable as such, as in cases coming under article 22 of the articles for the government of the Navy. At times, also, custom is appealed to as a rule of interpretation of terms technical to the naval service.

Usage.--Mere practices or usages of service, although long-continued, are not customs and have none of the obligatory force which attaches to customary law. The fact that such usages exist, therefore, can never be pleaded in justification, of conduct otherwise criminal or reprehensible, nor be relied upon as a complete defense in a trial by court-martial. With the permission of the court, however, they may be introduced in evidence, with a view to diminishing to some extent the degree of criminality involved in the offense charged.

This regulation was upheld in *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857). The court dismissed warnings that the

article could be abused due to its "indeterminateness"

because the customs of the Navy are "well known."

174. It is a ludicrous assumption to contemplate a change in custom, at least as perceived by those promulgating regulations, progressing at anything but a snail's pace.
175. One longstanding Navy custom prohibited women aboard a naval vessel. By implication, if any fraternizing occurred, it was of a homosexual nature. Now women are permitted on ships, and this would seem to qualify as a new custom. The Navy still wants to utilize its "customary" rule to prohibit shipboard romance, and they successfully prosecuted the first such case between enlisted members in *United States v. Carter*, 23 M.J. 683 (N.M.C.M.R. 1986) (Male BMCS (E-8) had sexual relations aboard ship with female enlisted subordinate).
176. More accurately it is flexible, but over far too great a time span.
177. Naturally, fraternization can and does arise in numerous contexts. Historically, fraternization rarely involved sex, and when it did, it was generally homosexual. In his concurring and dissenting (in part) opinion in *United States v. Johanns*, 17 M.J. 862, 882 (A.F.C.M.R. 1983), Judge Miller noted in footnote 15 that he personally reviewed 237

appellate cases dealing with officer-enlisted misconduct.

He fit all these cases into one of four categories: (1) alcohol related, (2) gambling related, (3) "borrowing" money, and (4) sex related.

178. OPNAVINST at 3(c).

179. *Goldman v. Weinberger*, 475 U.S. 503 (1986). This case is best known for the degree of deference given to the military, which is thoroughly legitimized by this opinion. Nevertheless, Justice Brennan's dissent is so vociferous that it will not be forgotten.

A deferential standard of review, however, need not, and should not, mean that the court must credit arguments that defy common sense. When a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a credible explanation of how the contested practice is likely to interfere with the proffered military interest. Unabashed ipse dixit cannot outweigh a constitutional right.

Id. at 516.

Justice Brennan goes on to state, in footnote two to the above quotation, that First Amendment restraints imposed on military personnel by the government "may be justified only upon showing a compelling state interest which is precisely furthered by a narrowly tailored regulation."

See, e.g., Brown v. Glines, 444 U.S. 348, 367 (1980)

(Brennan, J., dissenting).

180. See generally Cox, The Army, the Courts, and the Constitution: The Evolution of Military Justice, 118 Mil. L. Rev 1 (1987).

181. Id. at 24. See also 10 U.S.C. § 976 (1982) (prohibits membership in, organizing of, and recognition of military unions); 18 U.S.C. § 2387 (1982) (prohibits interference with morale, discipline or loyalty of the armed forces); Dep't of Defense Directive No. 1325.6, Guidelines for Handling Dissent and Protest Activities Among Members of the Armed Forces (12 Sep. 1969). See also Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Huff, 444 U.S. 453 (1980); Greer v. Spock, 424 U.S. 828 (1976).

182. OPNAVINST at 3(c).

183. Regulations and the UCMJ have different, but related functions. Not all regulations implement the UCMJ.

184. Westmoreland, Military Justice--A Commander's Viewpoint, 10 Am. Crim. L. Rev. 5, 78 (1971).

185. OPNAVINST at 4.

186. Odder still is the fact that the Navy should use this weak language in an arguably punitive regulation. See para. 5(a). It is understandable to use such language in

nonpunitive regulations, such as the Army and Air Force did. In this context, it only creates confusion, (While one might argue the punitive nature of those regulations, it would seem to be a much weaker argument).

187. See Article 134(3) in Appendix B concerning "conduct of a nature to bring discredit upon the armed forces." The aspect of this regulation which involves bringing the service "into disrepute" or lowering the service "in public esteem" seems almost exclusively oriented to a civilian perspective of the conduct in issue. See supra note 188.
188. In *United States v. Bunker*, 27 B.R. 385 (1943), the court upheld the conviction of an Army major for fraternizing with enlisted men by consuming alcohol in public with them. The court pointed out, ostensibly as an aggravating factor, that approximately twenty-five civilians came into the bar while the major drank with his subordinates. Service discrediting conduct, then, is largely as seen through civilian eyes. In *United States v. Snyder*, 4 C.M.R. 15 (C.M.A. 1952), a Marine was charged with enticing other servicemen to engage in sexual intercourse with a female. This conduct was not considered service discrediting because it "transpired in the semi-privacy of a military reservation." Id. at 17. This further illustrates that discredit must be in the

public eye. The court went on to state that simple fornication would not violate Article 134.

189. See Los Angeles Times, supra note 119.

190. The military's regulation drew national attention last year when a Navy dentist stationed at the Air-Ground Combat Center, 29 Palms, California, was charged with fraternization by the Marine Corps for dating LCpl Scott Price, whom she married. The Marine Corps eventually dropped the charges.

Another case involved a one-star rear admiral, John W. Gates, Jr., who was "administratively removed" from his naval reserve command in Newport, R.I., last April for dating enlisted Reservist-Intelligence Specialist First Class Carol Lund.

The two had been dating for two years but they never attended any official Navy functions together in uniform and were not in the same chain of command. And Gates said last year: "We were not aware we were an embarrassment to anyone."

Navy Times, February 20, 1989, at 3.

Perhaps the admiral had not yet learned the "custom of the naval service." If only he had served a few more years, perhaps he would have known better. For those new to the military, who may not yet know or understand the custom, it could potentially be violated unknowingly; a trap for the unwary.

191. The author has coined the term "pure fraternization" to denote, under current regulations, a mutually consensual, non-deviate sexual relationship carried out in private and

off-base, out of uniform, where there is no issue of taint through any chain of command relationship, influence attempt, mild coercion or the like.

192. All service regulations make this same point of resolution at the lowest possible level. It is a sound, economical policy, and is also required by the Manual. See MCM, 1984, R.C.M. 306(b).
193. Familiar Rules on Relations Among Ranks Put in Writing, Navy Times, Feb. 20, 1989, at 3 (comments by Vice Admiral Boorda).
194. OPNAVINST at 5(a)(2).
195. Id. at 5(b).
196. Marriage poses the most difficult obstacle to logical fraternization regulations, for a "mixed marriage," or a marriage in the chain of command, stands as an authorized exception to the rule; an inherent paradox. Marriage will be discussed further in this thesis, but it has always been a thorn in the side of the military. The difficulties became apparent in World War II, and continue to this day. The following passage illustrates how absurd marriage in the military had become in that era:

The command policy that forbade married couples to cohabit was also a source of great annoyance. The logic behind it remains an enigma to this day. It applied only to couples in which the wife was

military; if she were a civilian, there was no hassle. This situation was aggravated by the common knowledge that many men had taken to living openly with local women.

The policy results were both ludicrous and predictable. For example, one Army Captain married to a military woman was admonished by his commander in a letter saying, "It has come to the attention of this headquarters that you are living with your wife. This must cease at once."

Holm, supra note 3, at 85.

197. Message, COMNAVAIRPAC, 250010Z Feb. 88, subject:

Fraternization.

2. A necessary part of this effort is a firm stand against fraternization. By fraternization I mean sexual and other excessively familiar behavior between seniors and juniors in the chain of command that tends to subvert the traditional senior-subordinate relationship and thereby compromises the senior's position of leadership. It is sometimes difficult to recognize the line between acceptable social contact that promotes morale and unacceptable fraternization that destroys it. Furthermore, because of the infinite variety of professional and social settings that could present the opportunity to fraternize, it is impossible to set forth a checklist of rules that would apply in all cases. The answer to this problem of recognizing fraternization is the same one that works whenever discretion must be exercised: sound judgment. Our senior people, in both officer and enlisted grades, routinely demonstrate this quality in all areas of professional life; they must do so here as well and set the example on a daily basis.

3. Fraternization cannot be tolerated for two fundamental reasons, both of which go right to the heart of effective leadership. First, when an intimate or overly familiar relationship develops between a senior and his/her subordinate, good order and discipline fall by the wayside. The chain of command has been compromised. Second, the reality, or even the appearance, of the favoritism that inevitably

results from undue familiarity will devastate unit morale, and, in turn, personnel readiness, especially among the junior member's peers. Respect for the senior will disappear and his/her effectiveness as a leader along with it.

198. 100th Cong., 2d Sess. (1988). Representative Byron of California submitted a concurrent resolution (H. Con. Res. 379, September 29, 1988, not passed) to the House Armed Services Committee which began as follows:

Whereas the current fraternization policies of the Armed Forces of the United States do not adequately address the realities inherent in a modern and sexually integrated military; whereas there is currently no consistent or uniform fraternization policy among the different branches of the Armed Forces . . .

This resolution appears in toto in Appendix F, and provides ample cause for concern by the services regarding their fraternization policies.

199. Article 134 specifically requires, in the elements of the offense of fraternization, that the "fraternization violate the custom of the accused's service."
200. The following proposal was from the Commander of Naval Sea Systems Command:

Fraternization Prohibited
No commissioned or warrant officer of the Naval Service shall knowingly fraternize with enlisted person(s), on terms of military equality.

Memorandum for the Record, Navy JAG, 5800, at 2, 23 Oct. 90.

201. 1184. Fraternization Prohibited.

1. Personal relationships between officer and enlisted members are inappropriate and are counter to long-standing tradition of the naval service. Those relationships and those between officers and between enlisted personnel where a direct senior-subordinate supervisory relationship exists are prohibited and subject to administrative and disciplinary action when they:

- a. are prejudicial to good order and discipline; or
- b. bring discredit to the naval service.

2. This policy applies to all regular and reserve personnel. (emphasis added)

Id. at 3.

202. Memorandum, Naval Inspector General 5800 Ser OOL/364, 19

Dec. 1988, subject: Revision of U.S. Navy Regulations.

Admiral Chang recommended that the second sentence of the above proposal be reworded to read as follows,

"Those relationships, between officers and other officers, and between enlisted personnel and other enlisted personnel, where a direct senior-subordinate supervisory relationship exists, are prohibited . . ."

Id. at 3. This proposes the use of the stronger word

"prohibited" and a clearer explanation of non-officer-enlisted fraternization.

203. The elements of the offense require one party to be an officer. The Explanation (see Appendix B), however, leaves open the possibility of enlisted-enlisted fraternization.

The difficulty with knowing just what the custom is remains quite ambiguous.

If all customs were written, it seems clear that it could be used to clarify the general Article and thus avoid constitutional attack under the void for vagueness doctrine. But custom is almost wholly unwritten. How many new recruits, or how many seasoned veterans know the complicated customs of the Army? It is not enough to argue that every person is presumed to know the law. In civilian law, a person, or his attorney, has the opportunity to examine the written laws and opinions. But where there are no written customs a person can only speculate whether his planned conduct will be a violation of unwritten custom and thus a violation of Article 134.

Hewitt, General Article Void for Vagueness, 34 Neb. L. Rev. 529 (1958).

204. Admiral Stumbaugh recommended a complete change to Article 1184 as drafted, with the following language substituted:

1184. Fraternization Prohibited

1. Personal relationships between officer and enlisted members which are unduly familiar and do not respect differences in rank and grade are inappropriate and violate long-standing traditions of the Naval service.
2. When prejudicial to good order and discipline or of a nature to bring discredit upon the Naval service, personal relationships are prohibited:
 - a. between officer and enlisted members whether direct senior-subordinate relationship exists, or not;
 - b. between officer members where a direct senior-subordinate relationship exists, and
 - c. between enlisted members where a direct senior-subordinate relationship exists.
3. The prohibitions in paragraph 2 of this article are punitive regulations, and naval

personnel who violate them are subject to administrative and disciplinary action. This article applies in its entirety to all regular and reserve personnel.

Navy TJAG Letter, Ser. 133/115 20/B, 15 Nov. 1988, subject:
U.S. Navy Regulations.

205. The Navy Office of the Judge Advocate General uses codes for different sections within its department. Code 20 is the military justice section; code 13 is the administrative law section.
206. Navy JAG Memorandum 225/88, 24 Oct. 1988, subject: U.S. Navy Regulations.
207. Id. at 4.
208. Navy JAG Memorandum 203/238, 4 Nov. 1988, subject: U.S. Navy Regulations. This memo references a Navy JAG memo (JAG Memo 5801 over M173/048/0, undated, subject: U.S. Navy Regulations), from Code 13 to Code 01 undtd), which recommended replacing the words "are counter to" (normal tradition) with the word "violate," since the Manual (MCM, 1984, Part IV, para. 83(b)) makes criminal any relationship not in consonance with the "customs of the service" when service discrediting or prejudicial to good order and discipline. Therefore, the author's objection is that, "by putting the world on notice that personal relationships

between officer and enlisted personnel 'violate longstanding traditions of the naval service,' policy is transferred into punitive sanction via paragraph 83(b) of the manual." Id. at 2. And finally, the author complains, "My lawyers are not sure what the Article says, either as proposed, or as revised by Code 13. If they can't understand it, we can't expect the troops to understand it either, or to obey it." Id. at 2. This is not included to air the Navy's dirty laundry, but to simply illustrate the tremendous complexity of regulating this area.

209. Navy Memorandum for CNO 5081 over Sep 133/11400/0, 5 Jul. 1990, subject: U.S. Navy Regulations. In the memo he objected to referencing Article 134 as recommended by the Director of the Naval Investigative Service (Memorandum for the Record, 5800, p. 4 (23 Oct 90)), as being "legally objectionable and unnecessary." The Navy JAG made this objection due to his concern that violations of regulations are generally charged under Article 92 vice 134. Additionally, Navy JAG pointed out that there was no need to mention its applicability to reserve personnel as that was already established as a general rule earlier in the Navy regulations. Finally, and most interestingly, Navy JAG objected to paragraph (3) since no other punitive regulation

came out and stated that it was punitive as this one now did. Two cases are relevant in regard to this issue: first United States v. Horton, 17 M.J. 1131, 1132 (N.M.C.M.R. 1984), where the court held that the "punitive character of a regulation is determined by examining it in its entirety and ordinarily, no single factor is controlling." The court went on to note that whenever the punitive character of a regulation is challenged the key issue is whether it "evidences an intention to regulate individual conduct and to punish individuals who violate its provisions." Id. The second case cited was United States v. Bright, 20 M.J. 661, 662 (N.M.C.M.R. 1985) where the court held that to determine if an order is punitive, "analysis of the character of the regulation requires consideration of the order as a whole."

This final issue of the punitive nature of the regulation is just one of a host of significant corollary issues any competent defense counsel should be raising in fraternization prosecutions. Thus, the "Swiss cheese" nature of the Navy regulation is no different from the others in that respect.

210. The Marine Corps policy on fraternization appears in Appendix B. It has not been revised in over a decade.

211. The Marine Corps regulation has consistently withstood constitutional void for vagueness challenges. While courts have not addressed whether Marine officers may date enlisted women of other services, the courts have stated that officers of the naval service are on notice that wrongful fraternization with enlisted personnel on terms of military equality is proscribed by Articles 133 and 134. See generally *United States v. Van Steenwyk*, 21 M.J. 795 (N.M.C.M.R. 1985); *United States v. Tedder*, 18 M.J. 777 (N.M.C.M.R. 1984), petition granted, 19 M.J. 115 (C.M.A. 1984); *United States v. Smith*, 18 M.J. 786 (N.M.C.M.R. 1984). See also *United States v. Baker*, No. 84 4043 (N.M.C.M.R. 30 August 1985). In *Baker*, the court recognized that Marine Corps officers, in particular, are on notice that their relations with enlisted personnel must be consistent with good order and discipline. But does that mean that such relationships are prohibited?
212. In *United States v. Tedder*, 18 M.J. 777 (N.M.C.M.R. 1984) the court recognized and essentially legitimized the vast differences in custom between the Marines and the Air Force. Air Force cases were held not relevant to the naval service. One must question whether this places an unfair burden on officers of the naval service, but this very issue was

raised in an equal protection context and failed in *United States v. Moultak*, 24 M.J. 316 (C.M.A. 1987).

213. The regulation applies, on its face, only to Marines. But the Marines are in the Department of the Navy and the Navy and Marine Corps are considered to be the same service. But is that true for purposes of this regulation? A defense counsel should raise this issue.
214. This is the type of vagueness that the author believes will not indefinitely survive scrutiny. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker v. Levy*, 417 U.S. 733, 735 (1974). See also infra note 373.
215. The ambiguity exasperates prosecutors, also, who charge Article 92 whenever applicable. See *United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990) (female DI fraternized with her female recruits). This ultimately is an issue of vagueness. In *Parker v. Levy*, 417 U.S. 733, 769 (1974) (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1971), the dissent stated that "Vague standards offend due process by failing to provide explicit standards for those who enforce them, thus allowing discriminatory and arbitrary enforcement." (Stewart J., dissenting). Another

analogous view on vague standards was provided in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1971), where the Court stated that, "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis."

216. The regulation covers relationships between officers and between enlisted Marines of different grades, if one reads into the regulation a bit. No chain of command, or senior-subordinate relationship, need exist. And, much to its dismay, the Marine Corps was caught completely off guard by the new Navy regulation. Conceivably, this occurred since the Navy was not certain of the Marine Corps policy. In any event, the Marine Corps is attempting to undo the damage.

Much to our surprise, article 1165, U.S. Navy Regulations, 1990, prohibits officer-officer and enlisted-enlisted fraternization (defined as "personal relationships . . . which are unduly familiar and do not respect differences in rank and grade") only when a direct senior-subordinate relationship exists. Thus, local orders and SOPs proscribing officer-officer or enlisted-enlisted fraternization are likely valid now only with respect to situations in which a chain of command relationship exists. Though article 1165 may satisfy the Navy, it appears to have been promulgated without regard to Marine Corps custom and traditions. We will seek an amendment. Stay tuned for developments.

Res Ipsa Loquitur, 3-90, 1 Jul. 1990, at 27.

217. A white letter is a memorandum signed by the Commandant of

the Marine Corps. They are sent out periodically to address issues which are of general concern to all Marines.

218. Consideration should be given to resolving these issues before issuing a White Letter. While the proposed alternative White Letter attempts to finesse these issues, it cannot preclude inconsistent actions regarding this matter. On the one hand we advise commanders by the White Letter that officer-enlisted marriages are inimical to mission accomplishment and contrary to good order and discipline, while on the other we continue to reenlist enlisted Marines who are married to officers, and to commission individuals who are married to enlisted members.

Marine Corps Letter for Deputy Chief of Staff for Manpower,
JA:DMB/MER:CWM 16 May 1983, subject: White Letter.

219. See United States v. Van Steenwyk, 21 M.J. 795 (N.M.C.M.R. 1985), where the court stated that, "a reasonably prudent officer is on notice to approach officer-enlisted relationships with cautious judgment" (emphasis added). What kind of guidance is this? Is it prohibited conduct or not? Why won't anyone say so?
220. The Army is caught in an identical situation. See also The Ronald Case and Need for a Clear Policy, Navy Times, Dec. 19, 1983, at 26. This article discusses recent Navy and Marine Corps fraternization cases and also highlights the issue of officer-enlisted marriages. Unfortunately, whether a Marine or sailor will get away with such a marriage depends solely on what his "CO decides." Correctly sizing

up this situation, a Navy official commented, "This is an open invitation to selective enforcement" (emphasis added).

221. The following are several Article 134 offenses. The elements other than those common to all Article 134 offenses (prejudice to good order and discipline or service discrediting) are included for consideration. Note how precise they seem in contrast to the fraternization specification. With most of the offenses (which follow) the prejudice to good order and discipline and service discrediting aspect of the offense is so obvious that proof of the "general" elements never becomes an issue. Contrast that also to the fraternization specification, where evidence of the general element is the major burden of proof. This incongruity is rather striking.

Indecent Act or Liberties with a Child.

- (a) That the accused committed a certain act upon or with the body of a certain person;
- (b) That the person was under 16 years of age and not the spouse of the accused;
- (c) That the act of the accused was indecent; and
- (d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both.

Comment: MCM, 1984, Part IV, para. 87. Virtually the only term which presents a definitional issue is "indecent," yet everyone knows indecent acts when they see them, similar to issues of pornography. Thus, this really is quite precise.

This is not specifically a military offense, as are the following examples, but it nonetheless illustrates the example of precision in a regulation.

Breaking Restriction

- (a) That a certain person ordered the accused to be restricted to certain limits;
- (b) That said person was authorized to order said restriction;
- (c) That the accused knew of the restriction and the limits thereof;
- (d) That the accused went beyond the limits of the restriction before being released therefrom by proper authority.

Comment: MCM, 1984, Part IV, para. 102. This purely military offense is capable of precise definition, and that precision has been attained. There is no guesswork.

Straggling

- (1) That the accused, while accompanying the accused's organization on a march, maneuvers, or similar exercise, straggled;
- (2) That the straggling was wrongful.

MCM, 1984, Part IV, para. 107.

Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button.

- (1) That the accused wore a certain insignia, decoration, badge, ribbon, device, or lapel button upon the accused's uniform or civilian clothing;
- (2) That the accused was not authorized to wear the item;
- (3) That the wearing was wrongful.

Comment: MCM, 1984, Part IV, para. 113. The above two articles provide another vivid contrast, in their

specificity, to the glaring ambiguity of the fraternization article.

222. Without standards, a commander has complete discretion. This is what gives rise to the void-for-vagueness issue. See *United States v. Mallas*, 762 F.2d 361 (1985) (criminal prosecutions for a violation of an unclear duty itself violates the clear constitutional duty of the government to warn citizens whether a particular type of conduct is legal or illegal); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (vagueness doctrine incorporates the idea of notice--laws invalid if not susceptible to objective measurement); *United States v. Critzer*, 498 F.2d 1160 (1974) (when a law is vague or highly debatable, an accused actually or imputedly lacks the requisite intent to violate it). See also infra note 373.
223. See *United States Sentencing Commission, Guidelines Manual*, Introduction, part 3 (1989). Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by different offenders.
224. The void for vagueness issue has not had full exposure to the light of day. The courts have not considered such a challenge where the nature of the fraternization was mild.

If they consider a case of interservice fraternization, the regulation will likely not hold up to a vagueness challenge posed by a sharp defense counsel. The author is aware that technically, the facts of a case are not relevant to the vagueness or specificity of a regulation. Nonetheless, the tendency for bad facts to make bad law is very real.

225. We are convinced the standard provided by the Marine Corps Manual has been successful. Marines and commanders have demonstrated a remarkable ability to recognize fraternization when they see it. The nightmare of officers having their careers ruined by innocent contacts and associations with subordinates has simply not materialized. Experience demonstrates that officers who are disciplined for unlawful fraternization are not unwitting victims. Typically, an officer whose fraternization requires formal processing has ignored repeated counseling and/or has actively attempted to conceal the improper relationship. These officers cannot credibly claim they were unaware of Marine Corps policy. (emphasis added)

Marine Corps Memorandum, SCR 6299, 5800 over JAR3, 14 Oct. 1986, subject: Fraternization.

226. Administrative separation would be conducted in accordance with Marine Corps Order P1400.32.
227. SECNAVINST 1420.1 gives the Secretary of the Navy the final decision on this action.
228. 10 U.S.C. § 629.
229. 10 U.S.C. § 5905.

230. Marine Corps Order P1900.16C (Separations Manual).
231. Discussion Guide, Fraternization, United States Marine Corps, Education Center, Quantico, Virginia (March, 1984).
[hereinafter Discussion Guide].
232. Discussion Guide at 2.
233. Id.
234. --The above definitions identify the terms "good order and discipline" as something that must not be violated by conduct such as fraternization.
- "Good order and discipline" are terms used to describe the essential quality of behavior within the armed forces. As Marines, we share in the responsibility to protect our nation. This is a serious business that may require us to endure extreme hardship, privation or even to give our lives so that the nation remains secure. Marines must be organized, trained, and ready for deployment to any crisis at any time. Our organization must have a highly refined quality of order so that, as a team, everyone knows their role and job and our efforts can join together in a manner that will achieve accomplishment of the mission. Discipline is each individual Marine's responsibility for responding willingly and instantly to the directions of a senior, and in the absence of orders, initiating appropriate action. With our traditional stress on the leader's responsibility for maintaining "good order and discipline," we will retain our readiness and capability to carry out the mission at all times.
- Id. at 5.
235. Id. at 2.

236. Marine Corps Order 5390.20, Leadership Training and Education, 12 June 1989.
237. Id. at 7.
238. Id. at enclosure (1); Sample Leadership Training Plan.
239. In the author's experience, it has rarely been a topic of leadership classes or seminars.
240. Virtually the only information a non-lawyer Marine would have access to would be the Marine Corps Order, and the Manual.
241. SECNAVINST 1920.6A.
242. See Appendix G statistics.
243. From 1982-1989 ten percent of the male officer misconduct cases and 50 percent of the female officer misconduct cases resulted in no punishment. This data was published in an additional enclosure to the footnoted statistics.
244. As with any other "criminal" undertaking, those engaged in this conduct are undoubtedly clandestine in their conduct of the relationships. As most prosecutors and police will reveal, the official statistics represent only a fraction of the actual offenses occurring.
245. Headquarters, U.S. Marine Corps will offer the following evaluative guidelines, if contacted for advice:

a. Superior/subordinate command relationships. These merit the strictest scrutiny since they are the most likely to create an appearance of partiality. Inappropriately familiar conduct between different grades within the unit pose the most obvious threat to good order, morale, and discipline.

b. Any relationship where the senior has the opportunity to act officially on behalf of the junior. For example, an aggravating circumstance would be the accused's having sat on the junior woman Marine's meritorious promotion board.

c. Previous counseling. As with any offense, continued fraternization after an official warning is more egregious. The offensive conduct becomes a direct affront to military authority. Moreover, if the counseling included an order to terminate the conduct, the offense may have shifted to an orders violation. This is especially important in the case of an enlisted member who may not fall within the ambit of unlawful fraternization as proscribed by Article 134, MCM (1984). Finally, counseling removes any question regarding the member's knowledge of service requirements in this area.

d. Attempts to conceal the improper conduct. Furtive acts demonstrate the member's awareness of the wrongfulness of the conduct and indicates the taking of a calculated risk.

e. The grade differential. Greater differences in grade enhance the possibility that a Marine Corps custom is violated by the association, and,

f. The use of grade to effect or further a relationship. This standard of conduct violation is an aggravating factor in cases of fraternization. It is an abuse of naval position to use grade to gain the attentions of a junior. This may occur overtly by ordering to

the junior to enter a private office, or more subtly by "requesting" a relationship under circumstances where the junior feels compelled to respond favorably.

g. Fraternization which includes adultery. An egregious form of fraternization occurs when the senior becomes sexually involved with a married junior, particularly when the junior is married to another junior Marine. The effect on morale and discipline can be devastating when a senior uses grade to interject himself or herself into the marriages of junior Marines.

Memorandum, Judge Advocate Division, Research and Policy Branch, Headquarters, U.S. Marine Corps, 14 Oct. 1986, subject: Fraternization.

These evaluation guidelines enunciate the logical process of analysis a commander or staff judge advocate would utilize in determining appropriate disposition.

246. See generally United States v. Moultaq, 24 M.J. 316 (C.M.A. 1987), and United States v. Tedder, 24 M.J. 176 (C.M.A. 1987) (both cases involve blatant fraternization on base, in uniform).
247. This type of conduct would surely be authorized in the Army or Coast Guard. In United States v. Moultaq, 24 M.J. 316 (C.M.A. 1987) the court noted that the accused's blatant fraternization would have certainly sustained a conviction in other branches of the armed forces--hence the court

denied his equal protection challenge. The reasonable inference to be drawn is that if the conduct would not run afoul of other service policies, then an equal protection challenge might be recognized. Yet, the court reveals its inherent problem with applying the regulation by noting that, "We state at the outset that we need not determine at this time whether acts of sexual intercourse and the maintenance of a romantic relationship between officer and enlisted personnel are sufficient, alone, to constitute fraternization under Articles 133 and 134." Id. at 833.

248. Paragraph 1000.4 of the Marine Corps Manual, in consonance with Articles 92 and 134 of the Manual for Courts-Martial, provide a broad basis for implementing and enforcing the Marine Corps fraternization policy. We have deliberately chosen not to define fraternization in all its possible manifestations, whether by Marine Corps order or other directive, preferring instead to trust that Marines will comport themselves within well known and long established customs of the Corps governing such relationships.

We trust as well that commanders at every level are capable of distinguishing between permissible and impermissible relationships, and taking appropriate action in case of the latter. This flexible but clear standard, tempered with good judgment and effective leadership, has proved itself time and again. It affords commanders the latitude necessary to determine when impermissible fraternization exists within their command, the extent to which that conduct threatens good order and discipline, and the appropriate command response. Traditionally, corrective measures have extended from informal counselling in the great majority of cases, to court-martial for those most egregious.

And we ensure the parameters of permissible and impermissible relationships constituting our Marine Corps policy on fraternization are taught and well publicized throughout the Corps and at every grade. This is accomplished through both formal and informal training and information programs at the small unit level, as well as through training incorporated into our professional military education programs for both officer and enlisted Marines. These programs are designed to provide practical guidance and examples that are both instructive and easily understood. By example, the "Users Guide to Marine Corps Leadership Training" (NAVMC 2767) addresses all aspects of our fraternization policy, to include real life problems.

In sum, Marine Corps policy on fraternization is well known, effective, and fair. It is a leadership responsibility vesting in the commander. It is the commander who rightly exercises necessary authority to address and correct fraternization within the command, and it is the commander we hold accountable for doing so in a measured and fair manner. The Marine Corps has its policy on fraternization. Additional guidance is simply unnecessary. (emphasis added)

Memorandum, Headquarters, U.S. Marine Corps, 5000 over MPP- 55, 16 Nov. 1990, subject: Department of Defense Policy on Relationships Between Service Members of Different Grades or Ranks.

249. As a Marine, the author has lived with this "guidance" in terms of advising Marines on their conduct in his capacity as both a commander and defense counsel. "Uncertainty" best describes the understanding of Marines in the field, and the written guidance is of no practical assistance.

250. Chamallas, Consent, Equality, and the Legal Control of

Sexual Conduct, 61 So. Cal. L. Rev. 777, 858 (1988). The author discusses an institutional preference for broad bans on amorous relationships, since expansive definitions "chill risky relationships without actually having to enforce the ban." But the author notes that little sexual liberty need be lost where the ban is on working or supervisory relationships. In those cases, a professor who wanted to date a student could wait until the class was over. See also, Allen, The Adaptation of the Custom Prohibiting Wrongful Fraternization to Regulate Social Relationships in the Enlisted Training Environment (Memoirs of a Fraternization Lawyer) (an unpublished paper presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia) (April 1983) (the author discusses other deleterious effects of "chilled" officer-enlisted relations such as retarded development of correct superior-subordinate relations, stilted views of military leadership, and failures to address issues).

251. This lack of language clearly indicating that the conduct is circumscribed means that the regulation is nonpunitive.
252. Statistics appear at Appendix G. Army statistics are minimal and do not provide ranks of offenders.

253. Although rare, it does occur. Higher ranking officers (colonels, admirals and generals) are usually older, and more mature. These traits check the reckless abandon of youth (and lower rank). High ranking officers receive a good deal of publicity when exposed. See Navy Times, supra note 190. See also Air Force Times, Nov. 19, 1990, at 4, where an Air Force Lieutenant General was recently forced to retire due to "inappropriate conduct with members of the opposite sex." Another reason for the rarity of such cases may simply be the small number of officers in grades O-6 and above, and the degree of protection afforded by high rank.
254. This would likely be a standards of conduct violation or sexual harassment.
255. In fact, the courts would probably agree with this analysis. In *United States v. Stocken*, 17 M.J. 826 (A.C.M.R. 1984), a SSG consumed alcohol, had sex (with one), and smoked marijuana with female privates not under his supervision. This was held to be no offense. While a footnote in the case discusses a draft of the Manual as requiring that the accused be a commissioned or warrant officer, that issue was not determinative, and in their penetrating analysis the court astutely notes that sex and alcohol are not illegal and do not constitute Article 134 violations. "Finally,

despite one's moral persuasions, fornication, in the absence of aggravating circumstances, is not an offense under military law." Id. at 829.

256. United States v. Calloway, 21 M.J. 770 (A.C.M.R. 1986) (LTC had relationships with two female 2LTs who worked for him).
257. It is important to record that the Army fraternization policy, like the Air Force's, is nonpunitive. This explains much of the "squishy" nature of the language.
258. OER. All services have "report cards" submitted by each officer's and noncommissioned officer's superior for the purpose of evaluating him for promotion and assignments.
259. Commanders must have discretion, but not unbridled discretion. A rating officer can always rate an officer on appropriate vs. inappropriate conduct. But it should not get out of hand by applying a concept of fraternization unique to the rater's state of mind. This can only occur due to the ambiguity of the regulation.
260. Court decisions are often necessary to fully define the parameters of a regulation. For example, in United States v. Cooper, C.M. 438700 (A.C.M.R. 1980) (memorandum opinion), an officer who was a former commanding officer of an enlisted woman he had sex with (on post in his quarters) was

held to have prejudiced good order and discipline by this act because he was still in the same battalion with her.

261. The reasoning of the court in *United States v. Johanns*, 17 M.J. 862, 867 (A.F.C.M.R. 1983), highlights this point:

Once it is acceptable to have officers married to enlisted members, it is logical to conclude that mere dating is also acceptable, since that is nothing more than the socially acceptable preliminary stage to such marriage. Also, using our common sense and knowledge of human nature and the ways of the world, we note that it is not an uncommon practice for men and women who are dating, with or without marriage in sight, to engage in sexual relationships; in contemporary society such a practice is not considered immoral or unusual.

262. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

263. The Army Judge Advocate General held long ago that commanding officers may not prohibit marriage among subordinates. Command VA2, Digest of Opinions of the Judge Advocates General of the Army 1912, at 266 (1917) (opinion rendered in 1876).

264. See *United States v. Sartin*, 24 M.J. 873 (A.C.M.R. 1987).

It is certain that the Army frowns on this type of relationship. In this case a SSG's conviction was upheld for having sexual intercourse with a trainee the night before graduation.

265. In *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981), the court dealt specifically with a trainer-trainee issue and

upheld the conviction. The court dismissed appellant's freedom of association claims. See also United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985).

266. The only feasible explanation for this incongruity is that the Army prefers installations to draft their own prohibitions on specific relationships such as trainer-trainee, and then prosecute violations under Article 92. The Army, along with the Marine Corps, seems to feel they are on firmer footing with that approach as opposed to prosecution under Article 134. In an interview with LTC H. Wayne Elliott, USA, Chief, Int'l Law Div., TJAGSA (Feb. 11, 1991), he noted that the Army, in anticipation of losing Parker v. Levy, 417 U.S. 733 (1974) shifted its criminal focus for Articles 133 and 134 to Article 92, thus making administrative and regulatory issues out of criminal law issues.

In its new incarnation as a linchpin of many local regulations, however, fraternization has taken on a more vigorous and powerful form. This evolution of fraternization from social taboo to punitive custom to modern regulation suggests that, in one configuration or another, the offense is here to stay.

Rose, The Military Offense of Wrongful Fraternization--

Updating an Old Custom 3 (unpublished paper presented to The

Judge Advocate General's School, U.S. Army, Charlottesville, Virginia) (April 1983).

267. In *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), the court refused to recognize NCO-enlisted fraternization absent a specific regulation against it. Nonetheless, this case put Army NCOs on notice that they could be prosecuted for fraternization. The new Army regulation was published within a year of this case. While Clarke may have put Army NCOs on notice that they may be prosecuted for fraternization, convictions are not a sure thing. The defense bar points out that the opinion in Clarke may be regarded as dicta and does not wear the armor of stare decisis. See *United States v. Taylor*, 5 M.J. 669, 670 (A.C.M.R. 1978); *Green v. United States*, 355 U.S. 184 (1957). See also *United States v. Stocken*, 17 M.J. 826 (A.C.M.R. 1984), which is still good law, injecting doubt into the issue. See Vogt, Fraternization After Clarke, *The Army Lawyer*, May 1989, at 45; Davis, "Fraternization" and the Enlisted Soldier: Some Considerations for the Defense, *The Army Lawyer*, Oct. 1985, at 27.
268. Even though the Army's policy is significantly more liberal than the Navy's or Marine Corps', it is widely recognized by commanders and the courts that "sexual liaisons between

superiors and subordinates are fatal to discipline within any organization." United States v. McFarlin, 19 M.J. 790, 792 (A.C.M.R. 1985).

269. This will usually be applied to instructor-student situations, also. Such cases will generally charge Article 92 in the alternative for contingencies of proof. See United States v. McKinnie, 29 M.J. 825 (A.C.M.R. 1989) (SSG instructor had three female students to his apartment where they consumed liquor, played strip poker, and he fondled one while she showered). See also United States v. Mayfield, 21 M.J. 418 (A.C.M.R. 1986).
270. It first appeared in para. 4-14(e) in the only specific reference to officer-enlisted relationships.
271. UCMJ, Article 134.
272. See United States v. Parrillo, A.C.M. 28143 (7 Nov. 1990); United States v. Appel, 31 M.J. 314 (C.M.A. 1990); United States v. Wales, 31 M.J. 301 (A.F.C.M.R. 1990); United States v. Johanns, 20 M.J. 155 (C.M.A. 1985); United States v. Johanns, 17 M.J. 862 (A.F.C.M.R. 1983).
273. Actually, the Air Force should have been aware of the problems with its regulations a long time ago. In United States v. Pitasi, 44 C.M.R. 31 (1971), the court noted that while it might be difficult to draft a solid fraternization

regulation, "we recommend it to the appropriate authorities." Id. at 38.

274. Air Force Regulation, Professional Relationships, 30-1
(4 May 1983).

a. Professional relationships are essential to the effective operation of the Air Force. In all supervisory situations there must be a true professional relationship supportive of the mission and operational effectiveness of the Air Force. There is a long standing and well recognized custom in the military service that officers shall not fraternize or associate with enlisted members under circumstances that prejudice the good order and discipline of the Armed Forces of the United States.

b. In the broader sense of superior-subordinate relationships there is a balance that recognizes the appropriateness of relationships. Social contact contributing to unit cohesiveness and effectiveness is encouraged. However, officers and NCOs must make sure their personal relationships with members, for whom they exercise a supervisory responsibility or whose duties or assignments they are in a position to influence, do not give the appearance of favoritism, preferential treatment, or impropriety. Excessive socialization and undue familiarity, real or perceived, degrades leadership and interferes with command authority and mission effectiveness. It is very important that the conduct of every commander and supervisor, both on and off duty, reflects the appropriate professional relationships vital to mission accomplishment. It is equally important for all commanders and supervisors to recognize and enforce existing regulations and standards.

c. Air Force members of different grades are expected to maintain a professional relationship governed by the essential elements of mutual respect, dignity, and military courtesy. Every officer, NCO, and airman must demonstrate the appropriate military bearing and conduct both on and off duty. Social and personal relationships between Air Force members are normally matters of individual judgment. They become matters of official concern when such relationships

adversely affect duty performance, discipline, and morale. For example, if an officer consistently and frequently attends other than officially sponsored enlisted parties, or if a senior Air Force member dates and shows favoritism and preferential treatment to a junior member, it may create situations that negatively affect unit cohesiveness, that is, positions of authority may be weakened, peer group relationships may become jeopardized, job performance may decrease, and loss of unit morale and spirit may occur.

275. Id. at 20.
276. Id.
277. For example, note the organization of the U.S. Central Command, currently deployed in Saudi Arabia. It is comprised of all U.S. military services.
278. Interestingly, the Air Force and to a lesser extent, the government, in all prosecutions shies away from using the term "fraternization." Judge Miller noted that of 238 fraternization cases he looked at, 227 of them never used the term "fraternization" in the allegation. *United States v. Johanns*, 17 M.J. 862, 881 (A.F.C.M.R. 1983).
279. The Air Force felt "cornered" by recent cases where the court refused to enforce any Air Force custom based regulation. Johanns was the real impetus to their new regulation. Painfully aware that their new policy reflected aspiration more than reality (custom), they promulgated a new regulation, which responds directly to the Johanns case

where the court told the Air Force that they had no custom.

Now the Air Force can say, "We have a custom."

Unfortunately, the court still doesn't buy it. See United States v. Appel, 31 M.J. 314 (C.M.A. 1990); United States v. Wales, 29 M.J. 586 (A.F.C.M.R. 1989).

280. See United States v. Johanns, 17 M.J. 862, 869 (A.F.C.M.R. 1983). In the court's opinion, "the custom in the Air Force against fraternization has been so eroded as to make criminal prosecution against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command or supervision, unavailable." This is a good example of "pure" fraternization.

281. See Appendix B.

282. While there is no specific authority to support this point, how else could there be an apparent justification for diverse regulation of a subject which could easily be dealt with uniformly.

283. Air Force Regulation, Policy on Fraternization and Professional Relationships, 35-62 at 2(a) (16 Apr. 1990) [hereinafter AFR 35-62].

284. The court hit hard on this issue in United States v. Johanns, 17 M.J. 862, 867 (A.F.C.M.R. 1983). "If there

exists a customary ban on fraternization, and the avowed reason for such a custom is that fraternization is inimical to good order and discipline in the Armed Forces, how then could marriage change that effect? In our opinion, the situation would appear exacerbated by the closer relationship spawned by marriage."

- 285. AFR 35-62 at 2(b)(1).
- 286. Id. at 1.c.
- 287. Flatten, supra note 169, at 113.
- 288. See, e.g., Letter from COL Henry G. Greene, View from the Ditch, HQ 3902 ABW/JA, to HQ SAC/JA, Offutt AFB, Nebraska (9 Nov. 82), quoted in Mahoney, supra note 77, at 163.
- 289. In a very recent case, the court has made it abundantly clear that the Air Force has a long way to go towards having a coherent custom. In *United States v. Arthen*, A.C.M. 28590 (21 Dec. 1990) (to be published), a female major pled guilty to conduct unbecoming an officer due to fraternization and adultery with an airman in the same hospital she served in as a nurse. This case makes for humorous reading since virtually all the couples involved as witnesses or co-workers were also "mixed couples." Borrowing novel legal reasoning from the Federal courts in the case of *Donovan v. Mercer*, 747 F.2d 304, 306 (5th Cir. 1984), Judge Brown

reasoned that, "If it talks like a duck, and walks like a duck . . . it is a duck." The similar test used in this case was, "If it looks like fraternization, and the parties treated it like fraternization, it is fraternization." Even though her conduct met this test, the court did not accept the guilty plea as provident since there was no proof that her conduct violated a custom of the Air Force. In this case, she did not supervise the airman, so without proof of custom, the court reversed the plea but upheld the adultery conviction.

290. In United States v. Parillo,, A.C.M. 28143 (7 Nov. 1990). a female 1LT had sex with enlisted men under her supervision and offered cocaine to one. The court upheld her conviction consistent with Johanns since the men were in her chain of command.

291. In United States v. Wales, 31 M.J. 301, 312 (C.M.A. 1990), Judge Cox stated,

I must acknowledge that sexual conduct between consenting adults of the opposite sex is rarely prosecuted in the Air Force. From the cases I have seen, each prosecution was "triggered" by the conduct becoming a problem for the accused's superiors. Thus, Captain Wales is really being prosecuted because his situation became a command problem when the cuckolded husband made loud noises about the affair. The same thing happened to Major Appel.

To the author's knowledge, none of the services prosecute

adultery, standing alone. There is usually a trigger. The issue of multiplicity arises where fraternization is charged with adultery. See United States v. Jefferson, 21 M.J. 203 (C.M.A. 1986); and United States v. Walker, 21 M.J. 74 (C.M.A. 1985). Under different facts, they have been found not multiplicitious for findings or sentencing. See United States v. Smith, 18 M.J. 786 (N.M.C.M.R. 1984); and United States v. Rodriguez, A.C.M. 23545 (A.F.C.M.R. 29 Oct. 1982) at 8, where Judge Kastl gets right down to brass tacks:

First, we only selectively prosecute adultery. When one finds both fraternization and adultery charged, it strikes me that somebody has an axe to grind. All the conversation about how we're busy "protecting the marriage" doesn't ring true when our protection is so selective. Second, we seldom prosecute fraternization unless it involves sexual intercourse. Military justice reports aren't exactly chock-full of fraternization cases involving officer/enlisted borrowing or loaning of money; drinking together; or even sexual harassment. It is only the act of intercourse which--right or wrong--generally leads us to charge fraternization. Punishable conduct is worth one label, not two in my judgment.

292. Mahoney, supra note 77, at 168.

293. This occurred through opening the messes to all ranks, mixing military family housing without regard to rank, and condoning mixed marriages. This resulted in elimination of the prohibition on fraternization, and replaced it "with an amorphous form of situational ethics." See United States v.

Rodriguez, A.C.M. 23545 at 11 (A.F.C.M.R. 29 Oct. 1982).

See generally Mahoney, supra note 77.

294. In *United States v. Wales*, 31 M.J. 301, 302 (C.M.A. 1990), another case where the government failed to prove the Air Force custom against fraternization, the opinion of the court reeks with disgust at having to review yet another fraternization case:

"Once again, we must review an officer's conviction for fraternizing with an enlisted person. Once again, the gravamen of the fraternization charge is that there was sexual intercourse between the two. Once again, the fraternization charge has been joined for trial with an adultery charge arising out of sexual intercourse between the same two persons." (emphasis added)

295. The recent case of *United States v. Fox*, 31 M.J. 739 (A.F.C.M.R. 1990), points out that chain of command fraternization may be all the Air Force can successfully prosecute regardless of its regulations. Interestingly, the government prosecuted the fraternization of a captain with a master sergeant under his command under Article 134 here. The adultery, which so frequently accompanies fraternization, was held multiplicitious for sentencing.
296. Significantly, the Air Force has prosecuted its recent fraternization cases under Article 133 vice Article 134. See Wales, Appel and Parillo. The court cautioned the Air

Force that using Article 133 offered "no panacea from proving the fraternization offenses." Parillo, at 4. The government is free to charge Article 133 when the allegation is cognizable under another Article; see MCM (1984), Part IV, para. 59c(2). Yet one wonders why the Air Force has done this, because the government must then prove all elements of the underlying offense (fraternization), plus an additional element from Article 133--that the conduct was unbecoming an officer and a gentleman (or woman). See United States v. Ramirez, 21 M.J. 353 (C.M.A. 1986); United States v. Walker, 21 M.J. 74 (C.M.A. 1985); United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984). See also, United States v. Baker, No. 84-4043 (N.M.C.M.R. 30 Aug. 1985) (unpublished). In that case the court addressed the issue of whether to charge Article 133 or 134, and held that it was not conduct unbecoming an officer to "consume alcohol intemperately while socializing with enlisted Marines," one of whom accused kissed and spent the night with, but that this conduct was prejudicial to good order and discipline.

297. The Coast Guard regulation appears at Appendix B.

298. Coast Guard Personnel Manual, Commandant Instruction M1000.64, Chap. 8 (5 Apr. 1989) [hereinafter CGR]. This

regulation is only about one year older than the Air Force regulation.

299. Telephone interview with Captain William B. Steinbach, U.S. Coast Guard (5 February 1991). He was Chief of the Military Justice Division at Coast Guard Headquarters when the new regulation was drafted. He also served as a member of the Joint Service Committee. CAPT Steinbach stated that the Coast Guard Office of Personnel perceived a need for a fraternization regulation at this time, so his office drafted one. He noted that previously sanctioned officer-enlisted marriage had become an issue, and other uncertainties also existed. The regulation was drafted to clarify confusion on the subject, and is contained in the Personnel Manual.
300. CGR at 8-H-1(a) and (b).
301. This would normally indicate the nonpunitive nature of the policy, but sec. 8-H-5-C states that this is a punitive regulation. The lack of strong terminology elsewhere in the regulation renders this a debatable point.
302. CGR at 8-H-3(e).
303. Id. at 8-H-2(d).
304. Id. at 8-H-2(a).
305. Id. at 8-H-3.

306. Id. at 8-H-3(c).
307. Id. at 8-H-3(c).
308. In fact, there is no acceptable response to this question, except that the military cannot prevent marriage. Unfortunately, they are equally unable to prevent biological drives. Obviously, some sexual "drives," such as those resulting in rape and sodomy, are proscribed, but since the underlying sexual act in most fraternization cases (except where adultery is involved) is otherwise perfectly legal, the Coast Guard is reasonable and adopts an accommodating stance.
309. This is ultimately a concession to fairness, which pervades this policy. "An act should not be labelled criminal if committed by an officer but innocent when committed by an enlisted man." United States v. Claypool, 27 C.M.R. 376 (C.M.A. 1959).
310. CGR at 8-H-3(f).
311. The Coast Guard should have covered that in this otherwise thorough regulation.
312. Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).
313. In Orloff v. Willoughby, 345 U.S. 83, 94 (1952), the Court stated that the military is a "specialized community governed by a separate discipline from that of the

civilian." See also In Re Grimley, 137 U.S. 147 (1890)
(members of Armed Forces have a different status with
attendant rights and duties foreign to the civilian world).

314. Westmoreland and Prugh, supra note 81.
315. Current military leadership doctrine emphasizes persuasion rather than authoritarian domination and views a commander's primary goal as instilling high initiative and morale instead of harsh discipline. See M. Janowitz, The Military in the Development of New Nations 119 (1964).
316. Flatten, Fraternization, 10 A.F. Reporter 109, 112 (1981).
Colonel Flatten said it best: "It is difficult to envision a sir-sergeant level surviving more than the first five seconds of a courtship."
317. The means chosen are not narrowly tailored to meet a legitimate military purpose as they should be. The dissent in United States v. Penick, 19 B.R. (ETO) 261, 262 (1945) notes that, "No greater surrender of the freedom and dignity of men than is necessary should ever be made, and tendencies in that direction should be resisted in the Army as elsewhere." See also supra note 179.
318. See generally Secretary of the Navy v. Huff, 444 U.S. 453 (1980); Brown v. Glines, 444 U.S. 348 (1980); Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir. 1977);

Schlesinger v. Councilman, 420 U.S. 738 (1975); and Parker v. Levy, 417 U.S. 737 (1974).

319. The acronym for Sea, Air, and Land denotes a Navy Special Operations unit.
320. The courts unwittingly continue to validate the social basis for fraternization. Judge Snyder, dissenting in United States v. Johanns, 17 M.J. 862 (A.F.C.M.R. 1983) viewed a chain of command relationship as irrelevant since an officer's status and authority transcend the boundaries of a unit. Judge Miller concurred in this same dissent, stating that:

It is ludicrous to imply, as the majority did, that the officer corps can retain the dignity and respect required to maintain unquestioning obedience and trust of enlisted subordinates if officers are permitted to randomly compete with one-half of their subordinate population for the privilege of engaging that subordinate population's other half in the intimacies of recreational fornication.

Id. at 873. While the author does not believe that one-half of the Air Force enlisted population is female, this argument assumes that enlisted women will naturally prefer to date officers--an untrue assumption grounded solely in the anachronistic social/class premise.

321. Courts will currently intervene, for example, when convening

authorities abuse their discretion. United States v. Brown, 6 M.J. 338 (C.M.A. 1979).

322. Telephone interview with Captain Ronald S. Matthew, U.S. Coast Guard, Legal Officer, 12th Coast Guard District, Seattle, WA (28 January 1991). CAPT Matthew was one of the drafters of this regulation. He stated that a wide range of views were considered in drafting the regulation. One senior officer suggested an approach similar to the Marine Corps'. Cooler heads prevailed, and they drafted a regulation both reflecting actual, current practice and recognizing the fact that such relationships will occur. The new regulation has been successful. The drafters focused on the impact the relationship could have on the unit, and not on the relationship itself (by evaluating the ranks of the parties).
323. There are circumstances where continual failure to properly wear the uniform or to perform a physical fitness test could be charged under the UCMJ, but as a general rule these issues are handled administratively.
324. In United States v. Lovejoy, 42 C.M.R. 210, 213 (1970), Judge Darden, in his concurring opinion, stated:

Today many enlisted members of the armed forces have educational qualifications, intellectual capacity, and social standards that surpass those of some officers. Nonetheless, fraternization may have a pernicious

influence on military discipline. Despite my awareness of this, I must record my conviction that undue familiarity between an officer and a subordinate is susceptible of correction by administrative action.

In this case a naval officer engaged in sodomy with a male subordinate, and the fraternization charge merged into the sodomy specification. Regardless, it illustrates the misgivings many people have with punishing criminally consensual sexual/associational acts even within the chain of command. See also text accompanying supra note 136.

325. The author found no cases involving prosecution based on racial discrimination. The only area where this issue arises in is the selection of members for courts-martial. See generally, United States v. Hilow, 29 M.J. 641 (A.C.M.R. 1989); United States v. Cooper, 28 M.J. 810 (A.C.M.R. 1989); United States v. Hodge, 26 M.J. 596 (A.C.M.R. 1988); United States v. Moore, 26 M.J. 692 (A.C.M.R. 1988); United States v. Hemphill, A.C.M. S24483 slip op. (January 3, 1985).
326. Prosecution would probably be available under Article 133, UCMJ, but this conduct undoubtedly has occurred and yet no cases exist on point.
327. Very few prosecutions based on sexual harassment exist. See United States v. Savage, 30 M.J. 863 (N.M.C.M.R. 1990); United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990); United

- States v. Heffington, N.M.C.M.R. 840196 slip op. (July 31, 1984); United States v. Moorer, 15 M.J. 520 (A.C.M.R. 1983).
328. The author is not aware of any prosecutions for this type of fraternization. Nonetheless, it is potentially prohibited conduct, as is a relationship with Navy enlisted personnel. Neither of these are specifically countenanced by the regulation.
329. The proposed DOD standard appears in Appendix E.
330. The Doolittle Board is the name given to the Report of the Secretary of War's board on Officer-Enlisted Man Relationships; S. Doc. No. 196, 79th Cong., 2d. Sess 1-21 (1946) [Hereinafter referred to as the "Doolittle Board"].
331. The Doolittle Board looked at a broad range of topics, but it is best known for its suggestions to drastically revise relations between officers and enlisted men.
332. "I'll remember that when this becomes a democracy."--CAPT James T. Kirk, Commanding Officer, USS Enterprise, Starfleet.
333. These complaints are noted in the Doolittle Board Report, as well as in the articles at note 82, infra.
334. Much of the information considered in this thesis in the UCMJ discussion was considered by the Doolittle Board. The Board referenced George Washington's appraisal of the

"strained relations between officers and men," id. at 2, during the Revolutionary war. A similar reference was made to the Civil War where men in both Northern and Southern ranks bitterly complained about "aristocratic" officers who were more "interested in rank and privilege" than in the welfare of their men. Id. Quoting a report to the Secretary of War during World War I these same issues were addressed, citing the "bitterness engendered among the enlisted men by special privileges accorded the officer personnel (privileges that have no military significance nor value) who are in many instances mental and moral inferiors of half of their subordinates." Id.

The Board set the tone for their report initially noting that a "caste system" has no business in an American Army which utilizes democratic principles for the selection of its officers. The Board then succinctly summed up its viewpoint:

By reason of their historical dislike of the military system, Americans have a deep-seated feeling against and strongly resist any growth of an old-world type of military caste because such would be out of keeping with our democratic government. Therefore, as soon as soldiers returned to civilian status, many became articulate; some vociferous; and a few outright abusive. The peak of editorial attack on the Army was reached in the Spring of 1946.

Most of this writing is a discussion of the social distinction and resultant social privileges created by

the official breach, effected by tradition and custom of the service, between enlisted and commissioned personnel. (emphasis added)

Id. at 3.

World War II was an eye-opener for the Army, particularly in terms of lessons learned from personnel procurement with the rapid mobilization of civilians and their entrance into the Army. The previous gap between education and training of officer and enlisted personnel was not only narrowed but bridged. Many enlisted personnel were "far superior by training, education, and work experience, to men in the commissioned ranks." Id. at 4. Thus, while a rational albeit socially unacceptable basis had once existed for this officer-enlisted distinction, it could no longer be justified. What clearly compounded this problem, and forced the issue to the surface, was that many of these admittedly inferior officers were quite abusive of the enlisted personnel committed to their charge. Id. at 9. It is most instructive to note that many of the distinctions complained of by the enlisted personnel have since been abolished, and seem demeaning and degrading by current standards. For example, post theaters were segregated, with commissioned personnel receiving special seats, and enlisted personnel and families segregated from the officers. Id. at 8. At

officer's clubs, officers were generally waited on individually by enlisted personnel. Id. Enlisted personnel were specifically prohibited from associating with commissioned women personnel and from entering or attending any officer club or party except as a servant. Id. Enlisted personnel were utilized to perform "menial tasks and subservient duties" and it was "considered demeaning for commissioned to associate with enlisted personnel off duty or off military reservations." Id. These factors coupled with abuse of rank and privilege by incompetent officers certainly show, from today's perspective, justifiable grievances by enlisted men. There were other examples as well, such as officers using Army vehicles for social purposes. More examples of distinctions which existed included better and more abundant food, better recreation facilities "for officers only," liquor available to officers but not enlisted personnel, a distinction in the uniform of officer and enlisted personnel, enlisted personnel required "to assist and be a part in securing and providing many of the foregoing special privileges for commissioned personnel." Id. at 11. Many of the complaints raised still exist today, yet most significant ones have been abolished. The ones which were abolished were those which rankled

enlisted personnel most--those involving social distinctions. Since the distinction applied and persisted both on and off duty, they "directed attention to the unnecessary indignities suffered by soldiers--indignities which had no positive effect upon discipline and military efficiency." Id.

335. The term "fraternization" does not appear in the Doolittle Board Report.

336. Doolittle Board at 17.

337. Id.

338. Id. at 18.

339. Only the recommendations relevant to the issue of fraternization will be discussed. However, it is extremely important to note that these recommendations, some of which seem to fly in the face of traditional military wisdom and experience, were made by a blue ribbon panel of seasoned military men including a Medal of Honor winner. To provide a proper perspective on the recommendations, prior to "lowering the boom," the Board made its first three eminently practical recommendations, to show that the mission of the military is the highest priority, and that they had not forgotten this:

(1) There must be assurance that we, as a nation, have a modern, economical, efficient, and effective military establishments which can, if needed, win battles and a war.

(2) Maintenance of control and discipline, which are essential to the success of any military operation.

(3) Maintenance of morale which must be of the highest order and under continual scrutiny.

Id. The recommendations which appear in the text do not correspond to their actual numbers in the Board report. The three in this footnote were the first three in the report.

340. Exceptions to this rule would occur in occupied territories and under conditions where saluting might be appropriate to convey respect to local populations. The salute would remain in use on base and at ceremonial events.

341. 96th Cong., 1st Sess. 118 (1979).

342. Women in the Military Hearings, 96th Cong., 1st Sess. 145 (1979).

343. 100th Cong., 2d Sess. 379 (1988). The complete text of this resolution appears in Appendix F.

344. Representative Byron's bill did not pass. A working group was formed as a result of it, and renewed DOD interest in the subject can clearly be attributed to it. The time line of significant dates is as follows:

29 Sep. 88: Representative Byron submits concurrent resolution on fraternization.

23 Feb. 89: Office of the Secretary of Defense (OSD) Working Group on fraternization formed.

3 Mar. 89: OSD Working Group recommendations forwarded.

Fraternization, OAS (FM&P) Working Group Report, undated.

It is interesting to note that the working group's mandate, was to develop a DOD policy. Somehow, that was translated into deciding "whether" DOD should do so.

345. Memorandum, Office of the Assistant Secretary of Defense, Force Management and Personnel, 23 Jan. 1989, subject: Fraternization.

346. Id.

347. The report states: "If the Department did establish a policy it would have to be so vague and general that it would serve no useful purpose and in fact would confuse an already complex issue." Memorandum 5800 over M, for the Assistant Secretary of Defense (Force Management and Personnel), undated, subject: Recommendation Against DOD-Wide Policy on Fraternization.

348. The services have closed ranks against a DOD policy. This would not surprise Justice Douglas who stated, dissenting in *Parker v. Levy*, 417 U.S. 733, 770 (1974), "The military, of course, tends to produce homogenized individuals who think--

as well as march--in unison." Hopefully, this thesis will at least provide evidence to the contrary of that assertion.

349. Marine Corps Memorandum, 5800 over M, undated, subject: Recommendation Against DOD-Wide Policy on Fraternization.
350. Id. citing 10 U.S.C. §§ 933-934 for this proposition.
351. "Establishing a unified approach would defeat the central purpose of service-specific guidance and result in the further clouding of service initiatives aimed at enforcing adherence to service custom." Id.
352. The Marine Corps defends its position as follows:
- Our inability in this regard (to formalize the policy with specifics) does not indicate any shortcoming in our policy, however, nor do we imply any in the policies of the other services. Instead, it is an acknowledgement that fraternization involves complex interpersonal relationships, cast in settings which are infinitely varied. A rigid set of rules in this area could not hope to replace the flexible standard imposed by effective leadership and the exercise of good judgment under the customs of the individual services. (parenthetical clarification and emphasis added)
- Id.
353. See supra note 225. Most interesting in that paragraph is its consistent presentation of conclusions without justification. For example, through whose eyes is the current standard successful? Why would the Marine Corps standard not work for other services if it has served the

Marine Corps so well? How many careers have been ruined by innocuous contacts, which although not "innocent" had no potential for any adverse impact on good order, discipline, and/or morale? Regardless of whether officers actually disciplined for violation of the policy were aware of the policy is not the issue. The first issue is why officers would consistently and continually violate any policy, and second, whether the policy is prohibiting associations which could have no conceivable harm to the Corps.

354. Marine Corps Memorandum, supra note 349, cites United States v. Moultak, 21 M.J. 822 (N.M.C.M.R. 1985) which states that Marine Corps and Navy officers are on notice that fraternizing with enlisted personnel on terms of military equality violates Articles 133 and 134 of the UCMJ. Additionally, it cites United States v. Van Steenwyk, 21 M.J. 795 (N.M.C.M.R. 1985) holding that officers of the naval service (Marine Corps and Navy) are on notice that officer-enlisted relationships must be consistent with good order and discipline and must not give the appearance of familiarity or undue informality. This guidance is insubstantial and ambiguous.
355. See supra note 179.

356. Army Memorandum for Record, DAJA-CL/5163, subject: DOD Fraternization and Improper Relationship Policy, 17 Apr. 1989. Interestingly, this working group had a chaplain involved as a key player, lending a philosophical bent to the issue.
357. Army Memorandum DAP-MPH-L (600-20R), subject: Department of Defense Policy on Fraternization, undated.
358. Recommended DOD policies appear in Appendix H.
359. The author could not obtain any documents which indicate this. It definitely remains a topic of debate. Had the Secretary of Defense (SecDef) agreed with the services' advice, the possibility of a DOD regulation would be a dead issue.
360. Telephone interview with Major Steve Maurmann, USAF, Deputy Director Personnel Utilization, Office of the Assistant Secretary of Defense (OASD) (5 February 1991). He advised that at the last Defense Equal Opportunity Council (DEOC) meeting on 18 December 1990, this issue was addressed. The Assistant Secretary of Defense for Force Management and Personnel drafted a memorandum advising his subordinate Assistant Service Secretaries that a consensus had been reached that a DOD policy on fraternization would be appropriate.

361. The complete text of the draft regulation appears in Appendix H.
362. See Appendix H. The regulation frowns on relationships which give the "appearance of partiality," which could be any relationship with a significant rank disparity.
363. Decision Options Memorandum on Fraternization, OASD, undated.
364. The memorandum indicates decisions by SecDef to increase training, education, enforcement, and tracking of fraternization offenses by individual service. Also, the service Inspectors General may be required to include fraternization as part of a unit climate assessment review. The memorandum of decision options indicates that DOD may begin some tracking of its own, to include cases involving General/Flag officers, and/or O-4 and above in command billets. Also under advisement are a DOD survey to gauge fraternization policy effectiveness, and to track all court-martial cases.
365. Id. at 3.
366. The working group noted all policies of the services are gender-neutral in application, address relationships beyond officer-enlisted fraternization, and encourage professional relations between personnel. Id. Of course these

similarities are at an extremely basic level. The report continues to note that the Marine Corps has the strictest application derived from its policy which is the most general. The report also noted, correctly, that fraternization is not a problem confined to the military.

367. Washington Post, Oct. 22, 1980, at col. A1. This report of a Navy Inspector General study resulted in Navy representatives and Mr. Jehn (ASD, FM&P) being called to the Hill to discuss these issues with Senators Glenn and McCain, and Congresswoman Byron on 25 October 1990. This article also detailed problems with rape and sexual harassment.

368. Big test. With 40,000 women stationed in the gulf, there have apparently been quite a few battlefield romances. Medics in Saudi Arabia report that a rush of urine samples submitted for pregnancy testing has kept several units working full time. A positive test was the ticket home for at least one soldier. Troops tuned to Army radio last month heard the disc jockey rejoice that she was pregnant and would be headed stateside. Perhaps the grunts didn't share her joy. A request that the listeners call in with names for the baby drew few responses.

U.S. News & World Report at 14, February 18, 1991.

369. A handwritten note on the working group's report to SecDef dated 23 Feb. 1989 indicates that SecDef will not accept the status quo but may be willing to accept individual service regulations so long as they are consistent. Given the

services' current outlook on this issue, that is extremely unlikely.

370. See Appendix G for fraternization statistics provided by the services.
371. See Appendix I for a comparison of service policies in significant areas. DOD has not considered the Coast Guard's policy. The author is particularly skeptical of the Air Force and Army statistics, but they are provided as potentially useful information.
372. The suggested DOD standard appears at Appendix C.
373. Vagueness is the most frequent basis for attack on fraternization regulations. Simply because the courts have not declared the current regulations unconstitutionally vague does not mean they provide adequate guidance. See Amsterdam, The Void for Vagueness Doctrine in the Supreme Court, 109 U. Penn. L. Rev. 67 (1960) (This author proposes an excellent standard for vagueness: considering the nature of the government interests, the feasibility of more precision, and whether the uncertainty affects the fact or merely the grade of criminality. Since the fact of criminality is at issue with most current fraternization cases, vagueness is always an issue.) See also, Nichols, The Devil's Article, 22 Mil. L. Rev. 111 (1963); Cutts,

Article 134: Vague or Valid, 15 A.F. JAG L. Rev. 129 (1974); Cohen, The Discredit Clause of the UCMJ: An Unrestricted Anachronism, 18 UCLA L. Rev. 821 (1971); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970), Gaynor, Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article, 22 Hastings L.J. 259 (1971).

Even if the current regulations meet minimal due process standards, fairness dictates a higher standard. The typical void-for-vagueness analysis is instructive. It is well established that "[c]riminal statutes must have an ascertainable standard of guilt . . . adequate to inform persons accused of violations thereof of the nature and cause of the accusation against them." *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Accord *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."). The void-for-vagueness doctrine has two purposes: providing notice to those subject to the law, and establishing clear guidelines for those with responsibility for its enforcement. *Big Mama Rag, Inc. v. United States*, 631 F.2d

1030, 1035 (D.C. Cir. 1980). See Kolender v. Lawson, 461 U.S. 352, 358 (1983) (guidelines to enforcement); Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting) (fair warning); Screws v. United States, 325 U.S. 91, 151-52, 154 (1945) (Roberts, J., dissenting) (guidelines and notice).

Under the notice strand of the doctrine, a "law must therefore be struck down if men of common intelligence must necessarily guess at its meaning." Big Mama Rag, 631 F.2d at 1035 (quoting Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926))). See Winters, 333 U.S. at 524 ("so empty of meaning that no one desirous of obeying the law could fairly be aware"). Similarly, under the enforcement prong of the vagueness analysis, "laws are invalidated if they are 'wholly lacking in "terms susceptible of objective measurement."'" Big Mama Rag, 631 F.2d at 1035 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) (quoting Cramp v. Board of Public Instruction, 368 U.S. 278, 286 (1961))). It is clear that the current fraternization regulation provides minimal (albeit constitutionally sufficient) notice to those subject to it. Even if the regulation survives constitutional scrutiny, this hardly

means that its enforcement engenders respect. Likewise, there is clearly some measure of inequity in allowing individual commanders virtually unfettered discretion to enforce regulations.

374. United States v. Fox, 31 M.J. 739 (A.F.C.M.R. 1990) (USAF CPT had sex with two enlisted subordinates in his unit); United States v. Marks, A.C.M. 27946 (12 December 1989) (female USAF 2LT section commander had sex with enlisted subordinate and posed for nude photos for him; photos were subsequently shown to enlisted men in the unit); United States v. Haye, 29 M.J. 213 (C.M.A. 1989) (married female 2LT who was deputy crew commander at missile silo had sex with married TSGT subordinate; issue concerned her confession beaten out of her by her TSGT husband); United States v. Gray, 28 M.J. 858 (A.C.M.R. 1989) (SSG had sex with trainee in his unit and told her not to talk about it or they would both get in trouble); United States v. Hodge, 28 M.J. 883 (A.F.C.M.R. 1989) (2LT had sex with female airman who worked directly for him); United States v. Caldwell, 23 M.J. 748 (A.F.C.M.R. 1987) (USAF CPT fraternized with SSG in his section by engaging in sex with her and then showing her preferential treatment); United States v. Mayfield, 21 M.J. 418 (C.M.A. 1986) (2LT had sex

with trainee under his charge where prohibited by local regulation); United States v. Smith, 18 M.J. 786 (N.M.C.M.R. 1984) (married Marine CPT publicly courted enlisted subordinate on-base, in uniform, in presence of other Marines, and continued courtship in spite of her protestations).

375. At least one local regulation has been held void-for-vagueness at the trial level. SPCM CMO No. 4, 1st BCT Bde, Ft. Jackson, S.C. (14 March 1978) (United States v. Dexter) digested at 21 ATLA L. Rep. 216, 1 ATLA Crim. R. 28 (June 1978). See generally, Nelson, Conduct Expected of an Officer and a Gentleman: Ambiguity, 12 A.F. JAG L. Rev. 124 (1970) (Major Nelson points out that if Article 133 is ever declared unconstitutionally vague, it will be a result of pushing a weak case to trial, noting that "bad facts make bad law." He notes that this probably will not occur so long as restraint is exercised in its use.).
376. See statistics at Appendix G. Using these as representative, and considering the large numbers of both undetected and unreported fraternization, it is likely that officers violate the fraternization regulations more than any other. Whether this is factually true cannot be documented.

377. "Like life itself, the customs which man observes are subject to a constant but slow process of change." The Officer's Guide 206 (28th ed. 1962).
378. Winthrop defined military custom as a service-wide practice which must have prevailed without variation over a lengthy time period. The custom must also be clearly defined, uniform in application and equitable. Winthrop, supra note 20, at 42-43. The current disparate policies are in direct contravention to the purpose of the UCMJ: uniformity. See also Cohen, The Discredit Clause of the UCMJ: An Unrestricted Anachronism, 18 UCLA L. Rev. 821 (1971).
379. Murphy, The Soldier's Right to a Private Life, 24 Mil. L. Rev. 97 (1964).
380. F. Janowitz, The Professional Soldier 38-46 (1960).
381. "Consistently" is not intended to mean "identically." The courts have acknowledged that service secretaries can make regulations for their service even if not uniform with the other services. See United States v. Hoelsing, 5 M.J. 355 (C.M.A. 1973). This decision was based upon the impossibility of secretarial unanimity, and acknowledges that reasonable differences will occur. A similar circumstance exists in the application of the Federal Assimilative Crimes Act, 18 U.S.C. § 13.

382. DOD should also heed Colonel Flatten's warning to the Air Force:

If we continue to drift we will find that some cause celebre will arise between a firm commander and a determined officer. The decision will then be made for us by someone who has no experience in or regard for the institutional values and character of the Air Force. Through ignorance or malice, such a decision maker could do serious injury.

Flatten, supra note 169, at 116.

383. This idea was suggested by Major Carter in his thesis.

Carter, supra note 15, at 133.

384. Before addressing administrative concerns, it must be understood that a DOD standard, even if implemented, does not prevent the services from prosecuting fraternization violations outside the chain of command under Article 134 in accordance with their customs. Two major roadblocks would militate against such action by the services: first, military organizations do not usually contravene higher headquarters, and second, because a DOD standard would arguably change the custom for all services, conviction for "pure" fraternization cases would require prosecutors to clear a very high hurdle.

385. Current Marine Corps policy would seem to encourage this very practice:

In the meantime, many questions have arisen as to the means for dealing with these marriages. From a strictly legal standpoint, such a marriage does not preclude punitive action being taken for the prenuptial fraternization which most likely occurred. However, evidentiary problems as well as the public relations aspects of prosecuting such cases may make this course impracticable. The use of fitness reports by reporting seniors however should not be overlooked.

Memorandum for Staff Judge Advocates, Law Center Directors, Senior Military Judges; from Director, Judge Advocate Division, JAR, 8 Sep. 1982, subject: Officer-Enlisted Marriages.

386. See McDevitt, Wrongful Fraternization, 33 Clev. St. L. Rev. 547, 576 (1984-85). The author drafted a suggested fraternization regulation prohibiting relationships when personnel are in the same chain of command, or have a supervisory relationship, or in a battalion or smaller sized unit.
387. Officer-enlisted marriages were so frequent that they required specific guidance in the Air Force Family Housing Regulations. Under the provisions of Air Force Reg. 90-1, Family Housing, Table 6-4, Rule 1E (9 Mar. 1971), "mixed" marriage couples could choose officer or enlisted housing.
388. There are also statutory prohibitions on conduct involving business dealings with enlisted personnel.
389. See, e.g., SECNAVINST 1900.9A, AR 635-200, Chap. 15.

390. Homosexuality, as contrasted with fraternization, is a status, not a course of conduct. In *Dronenberger v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), the court upheld the discharge of a petty officer who engaged in repeated homosexual acts with a seaman. The court noted the certainty of prejudice to morale and discipline where the senior-subordinate relationship is "sexually ambiguous," and because so many military personnel find homosexuality "morally offensive." Given the nature of the rank structure, the possibility of "homosexual seduction" would also arise. *Id.* at 1398. See also, *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); *Martinez v. Brown*, 449 F. Supp. 207 (N.D. Ca. 1978); *Champagne and Stout v. Schlesinger*, 506 F.2d 979 (7th Cir. 1974). Regrettably, however, at least one recent case puts the writing on the wall that homosexuality may soon be forced upon the military. See *Watkins v. United States Army*, No. 85-4006 (9th Cir. 1988).

391. Here is an example typical of such debate:

Now, unless that system remains, we will have no discipline in the Army. You may talk all you please about leadership; there can be no discipline unless there is also the power of military punishment. Discipline will disappear as soon as we lose our system of courts-martial.

Report of Judge Advocate's Conference, 15-17 March 1944,
Office of the Judge Advocate General, Army Service Forces,
at 36. (Comments by Colonel Morissette.)

392. The Military Justice Act of 1983, Advisory Commission Report 155 (1984) (minority report).
393. In *United States v. Van Steenwyk*, 21 M.J. 795, 808, n.10 (N.M.C.M.R. 1985), Judge Mitchell noted that relationships are complex regardless of who is involved, but when an officer is involved, the normal problems of jealousy, envy, and perceptions of favoritism and advantage are magnified. In *United States v. Lowery*, 21 M.J. 998 (A.C.M.R. 1986), the court advanced compelling reasoning to prohibit a married officer from fraternizing. Yet these, like so many other effective arguments, address only chain of command fraternization.
394. *Parker v. Levy*, 417 U.S. 733, 769 (1974).
395. Courts are not likely to grant relief on the basis of freedom of association because that right protects political rather than social associations. *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460-61 (1958). See also, *Staton v. Froehlke*, 390 F. Supp. 503 (1975) (fraternization conviction of Army CWO for drinking alcohol with, undressing, and bathing enlisted woman not infringement of right to

associate). Claims invoking the right to privacy have also failed. *United States v. McFarlin*, 19 M.J. 790 (A.C.M.R. 1985) (right to privacy not absolute). See also, *Middendorf v. Henry*, 425 U.S. 25 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

396. 30 M.J. 886 (A.F.C.M.R. 1990).

397. It should be noted that there was some authority for viewing this type of conduct as fraternization. A similar circumstance arose in *United States v. Nelson*, 22 M.J. 550 (A.C.M.R. 1986), where the accused pled guilty to two specifications of fraternization: one specification of conduct unbecoming an officer by engaging in sexual intercourse with the wife of a subordinate and one specification of conduct unbecoming an officer by soliciting a male soldier of his command to arrange social engagements with an enlisted female soldier under his command in violation of Articles 134 and 133, UCMJ.

398. Id. at 891 (parenthetical clarifications added).

399. 27 M.J. 349 (C.M.A. 1989).

400. This officer had eight years service, was a Naval Academy graduate, and had a superb record.

401. By regulation, she was required to "disrobe from the waist

down, sit on a toilet, and urinate into a collection bottle." OPNAVINST 5350.4A.

- 402. The Lieutenant did provide a sample, but without direct observation. The sample tested negative.
- 403. Unger, 27 M.J. at 358.
- 404. We must assume that she did not raise these issues when she had to share locker and shower facilities with enlisted personnel.
- 405. Unger, 27 M.J. at 358.
- 406. W. Manchester, American Caesar 548 (1985) (in reference to American servicemen having relationships with German and Japanese women). This would appear to apply with equal force to fraternization outside the chain of command today.

APPENDIX A¹

University of Puget Sound, School of Law

Conflict of Interest Policies

Adopted 7 April 1989

1. A parent, spouse or child of a faculty member, or a person having or having had sexual relations with a faculty member, may not enroll or remain in a course taught by that faculty member.

2. Sexual relations between faculty members and students are inappropriate whenever the faculty member has any academic responsibility--awarding course credit, grading, evaluating, or supervising--for the student.

. . . .

4. Sexual harassment of a student is similarly unacceptable. Thus, law professors shall not engage in conduct that attempts to coerce a student into a sexual relationship, or to subject a student to sexual attention that the professor should recognize is unwanted.

¹Appendix A contains regulations pertaining to fraternization from the academic sphere. Inapplicable or irrelevant portions have been deleted.

CONSENSUAL SEXUAL RELATIONSHIPS

Rationale

The University's educational mission is promoted by professionalism in faculty-student relationships. Professionalism is fostered by an atmosphere of mutual trust and respect. Actions of faculty members and students that harm this atmosphere undermine professionalism and hinder fulfillment of the University's educational mission. Trust and respect are diminished when those in positions of authority abuse, or appear to abuse, their power. Those who abuse, or appear to abuse, their power in such a context violate their duty to the University community.

Faculty members exercise power over students, whether in giving them praise or criticism, evaluating them, making recommendations for their further studies or their future employment, or conferring any other benefits on them. Amorous relationships between faculty members and students are wrong when the faculty member has professional responsibility for the student. Such situations greatly increase the chances that the faculty member will abuse his or her power and sexually exploit the student. Voluntary consent by the student in such a relationship is suspect, given the fundamentally asymmetric nature

of the relationship. Moreover, other students and faculty may be affected by such unprofessional behavior because it places the faculty member in a position to favor or advance one student's interest at the expense of others and implicitly makes obtaining benefits contingent or [sic] amorous or sexual favors. Therefore, the University will view it as unethical if faculty members engage in amorous relations with students enrolled in their classes or subject to their supervision, even when both parties appear to have consented to the relationship.

Definitions

The term "consensual sexual relationship" may include amorous or romantic relationships, and is intended to indicated [sic] conduct which goes beyond what a person of ordinary sensibilities would believe to be a collegial or professional relationship.

Policy

A. Faculty/Student Relationships

1. Within the Instructional Context

It is considered a serious breach of professional ethics for a member of the faculty to initiate or acquiesce in a sexual relationship with a student who is enrolled in a course being taught by the faculty member or whose academic work is being supervised by the faculty member.

2. Outside the Instructional Context

Sexual relationships between faculty members and students occurring outside the instructional context may lead to difficulties. Particularly when the faculty member and student are in the same academic unit or in units that are academically allied, relationships that the parties view as consensual may appear to others to be exploitative. Further, in such situations the faculty member may face serious conflicts of interest and should be careful to distance himself or herself from any decisions that may reward or penalize the student involved. A faculty member who fails to withdraw from participation in activities or decisions that may reward or penalize a student with whom the faculty member has or has had an amorous relationship will be deemed to have violated his or her ethical obligation to the student, to other students, to colleagues, and to the University.

Association of American Law Schools
Statement of Good Practices by Law Professors
in the Discharge of Their Ethical and Professional
Responsibilities (1990)

Sexual relationships between a professor and a student who are not married to each other or who do not have a preexisting analogous relationship are inappropriate whenever the professor has a professional responsibility for the student in such matters as teaching a course or in otherwise evaluating, supervising or advising a student as part of a school program. Even when a professor has no professional responsibility for a student, the professor should be sensitive to the perceptions of other students that a student who has a sexual relationship with a professor may receive preferential treatment from the professor or the professor's colleagues. A professor who is closely related to a student by blood or marriage, or who has a preexisting analogous relationship with a student, normally should eschew roles involving a professional responsibility for the student.

Denison University Policy

Undergraduate Handbook at 28.

C. DUAL RELATIONSHIPS STATEMENT AND GUIDELINES

A dual relationship is one in which a faculty/staff member has both a professional and a romantic or sexual relationship with a student. This includes those relationships which appear to involve genuinely mutual consent. Given the inherent inequality of power between student and faculty/staff, there are numerous factors which can greatly complicate a dual relationship. It is clear, for example, that such dual relationships undermine professional integrity in supervisory, educational and advisory contexts. For this reason, dual relationships are not acceptable. If a faculty/staff member engages in such a relationship, he/she must at the very least divest himself/herself of supervisory, educational or advisory responsibility for that student. If the faculty/staff member chooses not to take this step, other options must be pursued. Such other options include the resignation of the faculty/staff member, an extended leave of absence until the student has graduated, or the transfer of the student to another institution. Otherwise, a continuing relationship may be considered as the basis for disciplinary action on grounds of moral delinquency or professional incompetence. Given the inherent inequality of a dual relationship, what may appear to one

participant as totally voluntary may in fact entail exploitation; thus, the Sexual Harassment Grievance Committee will not accept a defense against subsequent charges on grounds of the relationship being consenting.

APPENDIX B¹

(a) To the prejudice of good order and discipline

"To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.

(b) Breach of custom of the service

A breach of a custom of the service may result in a violation of clause 1 of Article 134. In its legal sense, "custom" means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned. Many customs of the service are now set forth in regulations of the various armed

¹MCM, 1984, Part IV, para. 60 (Article 134).

forces. Violations of those customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive.

(3) Conduct of a nature to bring discredit upon the armed forces (clause 2). "Discredit" means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.

The elements of the offense of fraternization are as follows:⁴

(1) That the accused was a commissioned or warrant officer;

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the

⁴MCM, 1984, Part IV, para. 83.

armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation

(1) In general. The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

(2) Regulations. Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92.

APPENDIX C^a

MIXED-GENDER RELATIONSHIPS

Purpose

1. This order prescribes the policy and provides guidance concerning conduct for mixed-gender relationships involving members of the Canadian Forces (CF).

Definition

2. In this order:

military members

means two members of the CF, or a member of the CF and a member of a foreign military force, of opposite sexes;

in public

means those circumstances where military members might reasonably be expected to be within the view of or be overheard by a person other than a member of their families, whether that person might be another member of the CF a member of foreign military forces or a civilian; and

personal relationships

means a romantic or sexual relationship, including legal marriage, between military members.

^aThis section contains Canadian Forces Administrative Order (CFAO) 19-38 (1988).

General

3. Good discipline requires that certain attitudes exist in units and other elements of the CF. These attitudes include respect for authority, immediate obedience to orders and confidence that authority will be used fairly and impartially. High cohesion and morale depend, among other factors, on members of a unit being treated without favoritism, on members being equally committed to the support of all others in the team in which they function and on the performance and safety of the unit being the primary concern of all members.

4. To foster the conditions necessary for good discipline, cohesion and morale, certain customs and conduct are maintained in the CF. For example, formal forms of address and the paying of compliments such as saluting are required among members of different rank groups and separate messes are normally maintained for members of different rank groups.

5. The effectiveness of the CF can also be influenced by the public perception of the competence and efficiency of members. For example, the public perception of the CF could influence the effectiveness of recruiting programs. A positive perception is enhanced when members are seen by the public to be smartly dressed, professional in their conduct and in strict compliance

with orders and instructions governing proper forms of address and the paying of compliments.

Policy

6. In relations between military members, the standards of conduct in public of the CF members involved must:

- a. be consistent with the high levels of discipline, cohesion and morale that are essential to operational effectiveness;
- b. contribute to a positive public perception of the CF; and
- c. conform to the general standard required of all members.

Postings

7. To prevent real or perceived conflicts of interest, military members who are known to be engaged in a personal relationship will not normally be posted to the same unit. However, where a unit is of sufficient size that posting military members involved in a personal relationship is unlikely to create personnel difficulties, military members may be posted to the same unit but not the same sub-unit. Military members will not normally be posted to establishment positions in which the higher ranking member would be in the direct chain of command of the other member.

8. Subject to paragraph 9, military members who form a personal relationship while serving in the same unit, or who are in the same chain of command when different ranks are involved, will normally complete their current postings.

9. If, in the Commanding Officer's (CO) opinion, a personal relationship is having or is likely to have a serious adverse effect on the discipline, cohesion or morale of the unit, the CO shall forward immediately all particulars and the CO's recommendations to NDHQ/CPCSA (Chief Personnel Careers and Senior Appointments) through the normal chain of command. Upon approval of CPCSA, one or both of the military members involved shall be posted from the unit as soon as possible.

Guidance for Conduct

10. Long-established customs have set standards of conduct for all members, both in and out of uniform, that must be observed in relationships between military members. It would not be possible to specify rules for every conceivable situation. Common sense and good judgement applied in keeping with the customs and traditions of the CF are required of all members.

11. In relationships between military members, CF members can support the effectiveness of the CF by refraining from any conduct which is inappropriate under the circumstances. For example, it would normally be inappropriate in public for military members in

uniform to hold hands, kiss other than as a greeting or farewell, embrace or caress each other. Such conduct might also be inappropriate when military members are out of uniform if they might reasonably expect to be seen by other members who know them and their relative ranks or appointments are such that an open display of intimate familiarity would detract from discipline, cohesion or morale. Social activities and practices that are in keeping with the customs and traditions of the CF continue to be acceptable. For example, military members dancing at a mess function or expressions of camaraderie such as a hug among military members of a team during a sporting event would normally be acceptable.

12. When there is a personal relationship between military members, CF members shall not attempt, or appear to attempt, to affect the other member's career by any means, including involvement in the other member's:

- a. personnel evaluation reports;
- b. postings;
- c. selection for courses;
- d. duties or scheduling for duties; or
- e. documents or records.

unless required to do so to carry out assigned duties. When required by duty to become involved in any of the above matters or

matters of a similar nature, military members are expected to act in a fair and impartial manner and not permit their relationship to affect the proper execution of their duties.

13. In relations between military members, normal standards apply, including:

- a. using the proper forms of address;
- b. attending messes; and
- c. observing all orders and instructions governing entry to accommodation assigned to members of the opposite sex.

Discipline and Career Action

14. Counselling may be used to foster conduct that conforms with the guidance contained in this order. If counseling is not effective, the following administrative action shall be considered:

- a. a Recorded Warning or Counselling and Probation; or
- b. a Report of Shortcomings in accordance with CFAO 26-21, Career Shortcomings--Officers; or
- c. a Reproof in accordance with QR&O [Queen's Regulations and Orders] 101.11.

15. Some conduct between military members may warrant proceedings under the Code of Service Discipline. Such action may be required as a result of one act that is so unacceptable that disciplinary

action would be more appropriate than administrative action, or it may be required as a result of a series of incidents involving a member of the CF where administrative action has failed to halt inappropriate conduct. The determination of when disciplinary action is advisable is the responsibility of unit authorities.

APPENDIX D^{*}

U.S. Navy Fraternization Policy^{**}

1. Purpose. To issue policy regarding fraternization.
2. Policy. Personal relationships between officer and enlisted members which are unduly familiar and do not respect differences in rank and grade are inappropriate and counter to long-standing custom and tradition of the naval service. Similar relationships involving two officers or involving two enlisted members where a senior-subordinate supervisory relationship exists are also inappropriate. Inappropriate conduct of this nature is to be avoided and, when it is found to exist, commands are expected to take administrative or disciplinary action as necessary to correct it. Additionally, such inappropriate relationships subject the involved members to disciplinary action under the Uniform Code of Military Justice (UCMJ) when the actions or relationships:
 - a. Are prejudicial to good order and discipline; or
 - b. Bring discredit to the naval service.
3. Background/Discussion
 - a. The Navy has historically relied upon custom and tradition to define the bounds of acceptable personal

^{*}This section includes the fraternization policies from all five uniformed military services.

^{**}OPNAVINST 5370.2 (6 February 1989).

relationships among its members. Proper social interaction among officer and enlisted members has always been encouraged as it enhances unit morale and esprit de corps. At the same time, unduly familiar personal relationships between officers and enlisted members have traditionally been contrary to naval custom, for they undermine the respect for authority which is essential to the Navy's ability to accomplish its military mission. Over 200 years of seagoing experience has demonstrated that seniors must maintain thoroughly professional relationships with juniors at all times. This custom developed in recognition of the need to prevent the use of senior grade or position in such a way that it resulted in (or gave the appearance of) favoritism, preferential treatment or personal gain or involved actions otherwise reasonably perceived to undermine good order, discipline, authority, or high unit morale. In a like manner, custom has required that junior personnel recognize and respect the authority inherent in a senior's grade, rank, or position, a requirement facilitated by observance and enforcement of the military courtesies and customs that have traditionally defined proper senior-subordinate relationships.

b. "Fraternization" is the traditional term used to identify personal relationships which contravene the customary bounds of acceptable senior-subordinate relationships. Although

it has most commonly been applied to officer-enlisted relationships, fraternization also includes improper relationships between officer members and between enlisted personnel.

c. Historically, and as used in this instruction, fraternization is a gender-neutral concept. Its focus is on the senior-subordinate relationship, not the sex of the members involved. In this sense, fraternization is admittedly a uniquely military concept which might be offensive in a civilian organization. In the context of military life, however, it serves a valid and necessary purpose.

d. This instruction discusses only fraternization. Other forms of impermissible conduct or relationships, such as sexual harassment and unduly familiar personal relationships between naval personnel and civilian employees, are addressed elsewhere.

4. Definitions

a. Fraternization is:

(1) Any personal relationship between an officer and an enlisted member which is unduly familiar and does not respect differences in rank and grade.

(2) Any personal relationship between officers or between enlisted personnel which is unduly familiar and does not respect differences in rank and grade where a senior-subordinate supervisory relationship exists.

b. "Senior subordinate" refers to the military relationship between members, including members of different services, in which one is senior to the other by virtue of grade, rank, or authority.

5. Prohibited Relationships

a. General

(1) Fraternization, as defined in paragraph 4, is punishable as an offense under the UCMJ when it is prejudicial to good order and discipline or brings discredit to the naval service. It is impossible to set forth every act that may be prejudicial to good order and discipline or is service discrediting because the surrounding circumstances often have more to do with making the act criminal than the act itself.

However, dating, cohabitation, or sexual intimacy between officers and enlisted members is clearly inappropriate, as would be a private business partnership between officer and enlisted members. Likewise, such conduct between officers and between enlisted personnel where a senior-subordinate supervisory relationship exists is equally inappropriate.

(2) Conduct which constitutes fraternization is not excused by a subsequent marriage between the offending parties.

b. Marriage and Family Relationships.

Servicemembers who are married or otherwise related (father/son, etc.) to other servicemembers must maintain the requisite respect

and decorum attending the official relationship while either is on duty or in uniform in public.

c. Assignment Policy. Compatible with sea/shore rotation policy and the needs of the service, servicemembers married to each other will not be assigned in the same chain of command.

6. Action/Responsibility

a. Seniors throughout the chain of command shall:

(1) Be especially attentive to their personal associations such that their actions and the actions of their subordinates are supportive of the military chain of command and good order and discipline.

(2) Ensure that all members of the command are aware of the policy set forth in this instruction.

(3) Eliminate offending conduct by taking appropriate administrative action, to include counseling and reassignment and, if necessary, by taking appropriate disciplinary action.

b. The responsibility for preventing inappropriate relationships must rest primarily on the senior. While the senior party is expected to control and preclude the development of inappropriate senior-subordinate relationships, this policy is

applicable to both members and both are accountable for their own conduct.

U.S. Navy Regulation, Article 1165 (1990).

Fraternization Prohibited

1. Personal relationships between officer and enlisted members which are unduly familiar and which do not respect differences in rank are inappropriate and violate long-standing traditions of the naval service.

2. When prejudicial to good order and discipline or of a nature to bring discredit on the naval service, personal relationships are prohibited:

a. between an officer and an enlisted member which are unduly familiar and do not respect differences in rank and grade;

b. between officer members which are unduly familiar and do not respect differences in rank and grade where a direct senior-subordinate supervisory relationship exists; and

c. between enlisted members which are unduly familiar and do not respect differences in rank and grade where a direct senior-subordinate supervisory relationship exists.

3. Violation of this article may result in administrative or punitive action. This article applies in its entirety to all regular and reserve personnel.

U.S. Marine Corps Fraternization Policy^{*}

Relations Between Officers and Enlisted Marines. Duty relationships and social and business contacts among Marines of different grades will be consistent with traditional standards of good order and discipline and the mutual respect that has always existed between Marines of senior grade and those of lesser grade. Situations that invite or give the appearance of familiarity or undue informality among Marines of different grades will be avoided or, if found to exist, corrected. The following paragraphs written by the then Major General Commandant John A. Lejeune appeared in the Marine Corps Manual, Edition of 1921, and since that time have defined the relationship that will exist between Marine officers and enlisted members of the Corps:

a. "Comradeship and brotherhood. -- The World War wrought a great change in the relations between officers and enlisted men in the military services. A spirit of comradeship and brotherhood in arms came into being in the training camps and on the battlefield. This spirit is too fine a thing to be allowed to die. It must be fostered and kept alive and made the moving force in all Marine Corps organizations.

^{*}Marine Corps Manual, para. 1100.4 (1980).

b. "Teacher and scholar. -- The relation between officers and enlisted men should in no sense be that of superior and inferior nor that of master and servant, but rather that of teacher and scholar. In fact, it should partake of the nature of the relation between father and son, to the extent that officers, especially commanding officers, are responsible for the physical, mental, and moral welfare, as well as the discipline and military training of the young men under their command who are serving the nation in the Marine Corps.

c. "The realization of this responsibility on the part of officers is vital to the well-being of the Marine Corps. It is especially so, for the reason that so large a proportion of the men enlisting are under twenty-one years of age. These men are in the formative period of their lives, and officers owe it to them, to their parents, and to the nation, that when discharged from the services they should be far better men physically, mentally, and morally than they were when they enlisted.

d. "To accomplish this task successfully a constant effort must be made by all officers to fill

each day with useful and interesting instruction and wholesome entertainment for the men. This effort must be intelligent and not perfunctory, the object being not only to do away with idleness, but to train and cultivate the bodies, the minds, and the spirit of our men.

e. "Love of corps and country. -- To be more specific, it will be necessary for officers not only to devote their close attention to the many questions affecting the comfort, health, military training and discipline of the men under their command, but also actively to promote athletics and to endeavor to enlist the interest of their men in building up and maintaining their bodies in the finest physical condition; to encourage them to enroll in the Marine Corps Institute and to keep up their studies after enrollment; and to make every effort by means of historical, educational and patriotic address to cultivate in their hearts a deep abiding love of the corps and country.

f. "Leadership. -- Finally, it must be kept in mind that the American soldier responds quickly and readily to the exhibition of qualities of leadership

on the part of his officers. Some of these qualities are industry, energy, initiative, determination, enthusiasm, firmness, kindness, justness, self-control, unselfishness, honor, and courage. Every officer should endeavor by all means in his power to make himself the possessor of these qualities and thereby to fit himself to be a real leader of men."

5. Noncommissioned Officers. The provisions of paragraphs 1100.3 and 1100.4 above, apply generally to the relationships of noncommissioned officers with their subordinates and apply specifically to noncommissioned officers who may be exercising command authority.

U.S. Army Fraternization Policy¹

4-14. Relations between [sic] soldiers of different rank

Relationships between soldiers of different rank that involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. It is Army policy that such relationships will be avoided.

a. Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between soldiers of different rank--

(1) Cause actual or perceived partiality or unfairness.

(2) Involve the improper use of rank or position for personal gain.

(3) Create an actual or clearly predictable adverse impact on discipline, authority, or morale.

b. The commander will be responsible for establishing the leadership climate of the unit. This sets the parameters within which command will be exercised and, therefore, sets the tone for social and duty relationships within the command.

c. Commanders share responsibility for the professional development of their soldiers. To this end, they encourage self-

¹Army Regulation 600-20 (30 March 1988).

study, professional development, and continued growth of their subordinates' military careers.

(1) Commanders and other leaders committed to the professional Army ethic promote a positive environment. If leaders show loyalty to their soldiers, the Army, and the Nation, they earn the loyalty of their soldiers. If leaders consider their soldiers' needs and care for their well-being, and if they demonstrate genuine concern, these leaders build a positive relationship carrying over into their lives with each other.

(2) Duty is obedience and disciplined performance. Soldiers with a sense of duty accomplish tasks given them, seize opportunities for self-improvement, and accept responsibility from their seniors. Soldiers, leader and led alike, work together to accomplish the mission rather than feed their self-interest.

(3) Integrity provides a way of life. Demonstrated integrity is the basis for dependable information, decision-making, and delegation of authority.

d. Professionally competent leaders will add to respect for their authority by--

(1) Striving to develop, maintain, and use the full range of human potential in their organization. This potential is a critical factor in insuring that the organization is capable of accomplishing its mission.

(2) Giving troops constructive information on the need for purpose of military discipline. Articles in the UCMJ which require explanation will be presented in such a way to ensure that soldiers are fully aware of the controls and obligations imposed on them by virtue of their military service.

(3) Properly training their soldiers, and ensuring that equipment and they, themselves, will be in the proper state of readiness at all times. Soldiers must be committed to accomplishing the mission through the unit cohesions developed as a result of a healthy leadership climate established by the command. Leaders at all levels promote the individual readiness of their soldiers by developing competence and confidence in their subordinates. In addition to being mentally, physically, tactically, and technically competent, soldiers must have confidence in themselves, their equipment, their peers, and their leaders. A leadership climate in which all soldiers are treated with fairness, justice, and equity will be crucial to development of this confidence within soldiers.

e. All soldiers and Army civilians must understand that this policy is based on the principle of good judgment. An association between an officer and an enlisted soldier might not be considered fraternization yet still be inappropriate. Similarly, certain relationships between enlisted soldiers, or

between officers, may be inappropriate. Just because a certain relationship does not break the law, does not mean it is acceptable or appropriate.

(1) Prejudgments in evaluating relationships and associations between soldiers of different rank have no place in military society. An association between soldiers of different rank who also are of different gender does not necessarily create a greater potential for impropriety than one between soldiers of the same gender. Relationships between males of different rank in the male-dominated military organization have as much potential for real or perceived partiality. Mentoring, coaching, and teaching of soldiers by their seniors should not be inhibited by gender prejudice. Strong bonds are needed to build commitment, esprit, and confidence necessary for mission accomplishment and human self-fulfillment.

(2) The policy applies to all relationships between soldiers of different rank. Any social or duty relationship may result in an impropriety. When soldiers date or marry other soldiers junior in rank, the potential for problems increases. Value conflicts may arise because the emotions and affections which draw people together are among the strongest in human society. In addition, there is a special confidence and trust placed in our officers and noncommissioned officers which must be honored. Soldiers must

remain aware that relationships between soldiers of different rank may lead to perceptions of favoritism or influence. The appearance of impropriety can be as damaging to morale and discipline as actual misconduct.

(3) Same sex relationships between soldiers of different rank may cause problems. The Army affirms managing our personal relationships to promote the health and welfare of all concerned and maintaining good order, morale, and discipline.

(4) The abuse of authority and the appearance of partiality are major causes of problems. The senior must exercise authority in such a manner as to affirm the welfare and dignity of all subordinates and limit the potential for actual or perceived abuse of authority.

(5) Certain structures within the military demand closer scrutiny because of the greater risk that they will involve partiality or an abuse of authority, or the appearance of either. These include, Initial Entry Training (IET), Advanced Individual Training, and military schools. Military commanders have always closely controlled relationships between trainers and trainees. The exercise of military authority over the life of a young soldier makes obedience the proper response to the senior. These relationships are regulated in a very restrictive manner. Also discouraged are relationships between senior and subordinate

members of the same unit or between soldiers closely linked in the chain of command or supervision. They are fraught with the possibility of actual or perceived favoritism, and are, therefore, potentially destructive of discipline, authority, morale, and soldier welfare.

(6) When the senior has authority over the lower ranking soldier or has the capability to influence actions, assignments, or other benefits or privileges, there is the strongest justification for exercising restraint on social, commercial, or duty relationships. At the same time, when the senior does not have this authority or capacity regarding the lower ranking soldier, social relationships are not inherently improper and normally need not be regulated. Soldiers must be aware, however, that even these relationships can lead to perceptions of favoritism and exploitation under certain circumstances.

(7) Because determinations are often made to judge a relationship as improper, supervisors, leaders, and commanders must exercise their best leadership. The professional Army ethic of loyalty, duty, selfless service, and integrity requires leaders of all ranks to be truly professional.

(8) Commanders have the responsibility to articulate what is improper. If the commander becomes aware of a relationship which has the potential for creating an appearance of partiality or

preferential treatment, counseling the soldiers concerned is usually the most appropriate initial action. This also generally holds true for those relationships which involve only the appearance of partiality and have had no adverse impact on discipline, authority, or morale. Counseling is a most effective leadership tool. In addition, commanders may use administrative actions (for example, reassignment, oral or written admonitions, or reprimands) to assist in controlling these relationships. A close, unofficial relationship between soldiers of different rank normally should not result in an unfavorable evaluation or efficiency report, relief from command, or other significant adverse action unless it clearly constitutes a relationship that violates this policy. Even in such cases, counseling the soldiers concerned and allowing them an opportunity to terminate the improper relationship, rather than immediate imposition of disciplinary or other significant adverse administrative action, usually will be most appropriate, this is especially true if there has been no actual partiality or unfairness and no actual use of rank or position for personal gain.

(9) When an official relationship between soldiers violates this policy, the Army is firmly committed to corrective action.

4-15. Trainee and soldier relationships

Relationships between permanent party personnel and IET trainees not required by the training mission are prohibited. This prohibition applies to permanent party officers and noncommissioned officers without regard to the installation or assignment of the permanent party member or IET trainee. The above prohibition does not forbid or restrict positive instructor-student relations but precludes improper relationships such as those referred to in paragraph 4-14.

4-16. Fraternization

Relationships in paragraph 4-14e, if between officers and enlisted soldiers, are prohibited by the customs of the Service and may constitute the offense of fraternization under the provisions of article 134, Uniform Code of Military Justice.

U.S. Air Force Policy¹

POLICY ON FRATERNIZATION AND
PROFESSIONAL RELATIONSHIPS

This regulation establishes Air Force policy for professional relationships between Air Force members of different grades or positions and Air Force members and members of other uniformed services. Unprofessional relationships, including fraternization, impact negatively on good order, discipline, respect for authority, maintenance of unit cohesion and mission accomplishment. This regulation applies to active duty, Air Force Reserve and Air National Guard members.

1. Air Force Policy on Professional Relationships:

a. Professional Relationships. Professional relationships are essential to the effective operation of the Air Force. The Air Force encourages personnel to communicate freely with their superiors regarding their careers and performance, unit effectiveness, workplace improvements, and a wide range of similar subjects. This type of communication enhances morale, improves the operational environment, and results in a more efficient, vital and responsive military organization. Participation by members of all grades in organizational activities, base intramural, interservice and intraservice athletic competitions,

¹Air Force Regulation 35-62 (16 April 1990).

unit-sponsored events, religious activities, community welfare projects and youth programs can also enhance morale and contribute to unit cohesion.

b. Unprofessional Relationships. Unprofessional relationships can develop between officers, between enlisted members, and between officers and enlisted members. Inappropriate familiarity can result in or create the appearance of favoritism, preferential treatment or impropriety. Such relationships degrade morale and discipline and must be avoided.

c. Fraternization. Personal relationships between officers and enlisted members which violate the customary bounds of acceptable behavior in the Air Force constitute fraternization and must be avoided. Timely and appropriate corrective action will prevent the development of improper relationships. When fraternization has prejudiced good order and discipline or discredited the armed services, criminal charges can be brought under the Uniform Code of Military Justice (UCMJ). See Manual for Courts-Martial, 1984, Part IV, Paragraph 83.

2. Discussion of Policy:

a. General Discussion. Personal relationships between Air Force members become matters of official concern when they adversely affect morale, discipline or mission accomplishment.

This policy focuses on the effect of a relationship on the Air Force as an organization and not on the nature of a particular relationship. Unprofessional relationships, including fraternization, undermine morale and discipline. They create the appearance that personal friendships and preferences are more important than individual performance and contribution to the mission. The policy and custom against fraternization have been a part of the heritage of the American military for over 200 years. The guidance set forth in this regulation is based on that custom and, when followed, should prevent the development of unprofessional relationships, including fraternization. Reasonable accommodation of married couples and related members may be appropriate.

b. Specific Situations. Experience and common sense have shown that certain relationships invariably have a negative impact on morale and discipline. Where the existence of certain factors make it reasonable to predict that an adverse impact will result, immediate action is required to correct the situation before morale and discipline are damaged. All members must be aware of the potential dangers of certain relationships and be particularly sensitive to the following:

(1) Relationships in the Same Chain of Command, Unit, or a Closely Related Unit. Unduly familiar relationships between

members of different grades or positions in these categories are almost always unprofessional. For example, members do not establish, or permit to be established, relationships which can reasonably be perceived to reflect partiality or favoritism. Consequently, they do not date or become personally obligated or indebted to junior members. Because the senior member normally exercises authority or some direct or indirect organizational influence over the junior member, the danger for abuse of authority is always present. The ability of the senior member to influence assignments, performance appraisals, promotion recommendations, duties, awards, and other privileges and benefits, places both the senior member and the junior member in a vulnerable position.

(2) Dating and Close Friendships. Dating, courtships, and close friendships between men and women are subject to the same policy considerations as other relationships. Like any relationships, they become a matter of official concern when they adversely affect morale, discipline, or mission accomplishment. Members entering into these relationships must consider the potential impact of their relationship on the organization. It follows that officers do not date enlisted members or share their offbase living quarters, personal vacations, or weekend trips with enlisted members.

(3) Other Relationships. Other relationships, not specifically addressed in (1) and (2) above, can, depending on the circumstances, lead to actual or perceived favoritism or preferential treatment and must be avoided. For example, officers do not attend social gatherings, gamble with or frequent clubs, bars or theaters on a personal, social basis with enlisted members. Also unprofessional relationships, including fraternization, between members of different services, particularly in joint service assignments, may have the same impact on morale and discipline as if the members were assigned to the same service.

3. Personal Responsibility for Maintaining Professional Relationships and Avoiding Fraternization. All members share the responsibility for observing respect for authority and maintaining military customs and courtesies. However, the senior member in a relationship is primarily responsible for maintaining the professionalism of that relationship. Leadership requires the maturity and discretion to avoid relationships which undermine respect for authority or which impact negatively on morale, discipline, or the mission. The senior member is in a better position to appreciate the effect of a particular relationship on an organization and is in a better position to terminate or limit

the extent of the relationship. This is especially true of officers and noncommissioned officers (NCO) who are expected to exhibit the highest standards of professional conduct and to lead by example.

4. Commander and Supervisory Responsibilities. Commanders and supervisors at all levels have the responsibility and authority to maintain good order and discipline within their units. If good professional judgment and common sense indicate that a relationship is causing, or may reasonably result in a degradation of morale, good order and discipline, corrective action is required. Action should normally be the least severe necessary to correct the relationship, giving full consideration to the impact the relationship has had on the organization. Counseling, alone, or in conjunction with other options, may be an appropriate first step. Corrective action in different cases need not be identical, but should be measured in terms of the nature of the relationship and the severity of its impact on morale, discipline, or the mission. The full spectrum of administrative actions, including, but not limited to, counseling, reprimand, removal, demotion, loss of NCO status, adverse comments in performance reports and processing for administrative separation, are also available as corrective tools. Instances of actual favoritism, partiality, or

misuse of grade or position may also constitute violations of the UCMJ, as does fraternization, and can result in punitive action.

U.S. Coast Guard Policy^{*}

8-H-1 GENERAL

- a. The Coast Guard has traditionally been bonded by a strong and sometimes very emotional feeling of mutual respect and loyalty between leaders and subordinates. These appropriate types of relationships are essential to the quality of service life and to the effective accomplishment of our demanding missions. Nothing in this article is intended to diminish or impede the development of appropriate professional or mentor-type relationships between seniors and juniors which enhance esprit-de-corps within the Service and perpetuate traditional Service norms and values. On the other hand, the existence of inappropriate senior-junior relationships can adversely affect the discipline and morale at our units and negatively impact mission performance.
- b. Traditionally, the term fraternization has been primarily used to refer to a personal relationship between an officer and an enlisted member without regard to gender. Fraternization may also be any senior-junior relationship between officers or between enlisted. Fraternization is a specific offense under the Uniform Code of Military Justice

^{*}Coast Guard Personnel Manual, Commandant Instruction M.1000.64, sec. 8-H-1 (5 April 1989).

(UCMJ) and the Manual of Courts-Martial. The term shall be used herein only in the military justice or criminal context.

- c. Personal relationships may also exist that may not constitute fraternization but are inappropriate. Personal relationships, without regard to gender, where the association between senior-junior members involves or appears to involve preferential treatment or the improper use of rank or position for personal gain; prejudices the good order, discipline, or morale of the unit; or compromises the chain of command are inappropriate.
- d. This section reflects the customs and traditions of the Service and establishes Coast Guard policy with respect to fraternization and senior-junior relationships.

8-H-2 RESPONSIBILITY

- a. Commanding Officers and Officers-In- Charge are responsible for ensuring that all members of their commands are familiar with the provisions of this section and they are aware of what constitutes fraternization or improper personal relationships. Commanding Officers and Officers-In-Charge are responsible for ensuring compliance with these

provisions and shall take appropriate action in response to violations.

- b. All members are responsible for their professional behavior and must use good judgment in developing appropriate personal relationships using the guidelines established by this section. This is especially true when the members involved are within the same chain of command or at small units where a supervisory relationship periodically exists outside the chain of command in the course of conducting normal duties. The senior in any relationship with a junior member shall ensure their conduct does not exceed or appear to exceed the bounds of propriety and does not adversely affect the good order and discipline or the guidelines established by this section. It is incumbent upon seniors to set the example for juniors by adhering to the highest standards of conduct.

8-H-3 GUIDELINES FOR ASSESSING THE PROPRIETY OF A RELATIONSHIP

- a. Social contact between members of different rank or grade is not inherently inappropriate. On the contrary, appropriate social events between seniors and subordinates help to

reinforce a sense of community within the Coast Guard family and are encouraged.

- b. The primary purpose of this section is to prohibit inappropriate personal relationships as defined. However, the exercise of sound judgment in assessing the existence of an inappropriate relationships is as important to fostering professional camaraderie and esprit-de-corps within the Service as it is to effectively intervening into situations involving fraternization or inappropriate relationships.
- c. The professional respect, loyalty and comradery [sic] generated by working relationships may, over time develop into close personal friendships and social relationships. Relationships between members of the opposite sex may develop into strong emotional attachments leading in some cases to marriage. Such relationships do not, by themselves, create problems and are accepted. Indeed, provisions relating to transfers and housing for married couples whose members are both in the Service exist in other directives and are not affected by this section.
- d. Central to assessing the propriety of any relationships between members of different rank or grade is the authority or influence one member exercises over the other, or that member's superiors, within the same chain of command.

Actual or perceived abuse of authority or preferential treatment towards a subordinate which stems from a close personal relationship erodes the trust of other members in the integrity and fairness of our military system. Factors to consider in making such determinations are:

- (1) the size of the unit involved;
- (2) the existence of any chain of command relationship between members or required professional interactions between members;
- (3) if the personal relationship between members compromises good order, discipline or morale; and
- (4) the nature of the personal relationship between the members, including its actual or perceived impact on the unit and its personnel.

- e. Certain organizational relationships within our military structure require closer scrutiny and management of personal relationships because the development of inappropriate senior-junior relationships has a very negative impact on the good order and discipline of the Service or has a detrimental effect on the formulation of acceptable standards of behavior in other members. These closely controlled relationships include all instructor-student associations with enlisted recruits, officer candidates, and

Academy cadets. The need to develop a strong understanding of the exercise of military authority precludes the development of even a casual association between trainer and trainee, not to mention the more damaging nature of a relationship which involves fraternization.

- f. In summary, when a senior has command or supervisory authority over a lower ranking member or has the capability to influence personnel or disciplinary actions, assignments, benefits or privileges, there is strong justification to exercise restraint on personal relationships. Where that kind of command influence is not present, personal relationships are not necessarily improper and normally need not be regulated.

8-H-4 GUIDELINES FOR RESOLVING ISSUES OF FRATERNIZATION OR INAPPROPRIATE RELATIONSHIPS

- a. General. Each command must assess the impact as to whether personal relationships involving unit members are improper within the framework of these regulations. Prevention or early resolution of situations where an improper personal relationship between a senior and a junior becomes an issue is in the best interest of all concerned. Resolution of

these situations should normally be attempted at the lowest level possible.

b. Counselling.

- (1) In many situations, counselling by each member's supervisor can effectively terminate improper relationships. This counselling may be very informal in nature without follow-on documentation, or more formal in nature including written documentation of such action. If written documentation is deemed appropriate, it should be by a page 7 entry for enlisted or by Administrative Letter of Censure for officers.
- (2) Comments and marks on both Officer and Enlisted Evaluations may be used to reflect involvement in an improper personal relationship.

c. Disciplinary Action.

- (1) Where deemed appropriate, non-judicial punishment or court-martial may be used to discipline members who are or have been involved in improper personal relationships detrimental to the customs or good order and discipline of the Service.
- (2) A Commanding Officer or Officer-in-Charge may refer the matter up the chain of command with a

recommendation for action when their disciplinary authority is limited and where stronger disciplinary measures are deemed appropriate.

8-H-5 ACTION

- a. Personal relationships between senior and junior members of the Service which cause, or appear to cause, partiality or unfairness, involve the improper use of rank or position for personal gain, or have a clearly demonstrated impact on discipline, authority or morale are prohibited.
- b. Commanding Officers and Officers-In- Charge have the authority and are responsible for investigating any personal relationship which appears to be contrary to the provisions of this section. If the investigation determines that an improper relationship exists, then it is the Commanding Officer's or Officer-In-Charge's responsibility to determine the appropriate resolution to the matter.
- c. This section constitutes a punitive general order under the UCMJ, and violations of its provisions are subject to prosecution under Article 92 and 134 of the UCMJ.

APPENDIX E

PROPOSED DOD STANDARD ON FRATERNIZATION

1. Background

a. The Department of Defense (DOD) recognizes diversity among the military services based on historical differences in mission, history, custom, and tradition. While diversity is a source of pride, esprit de corps, and is desirable in many areas, it should not lead to inconsistent policies, especially when violation of such policies is subject to criminal sanction. The application of different service fraternization policies has led to anomalous results. Without a uniform standard to guide the services, application of service customs have led to significantly dissimilar treatment for identical conduct. The inconsistency, inequity, and perception of unfairness this has created is not conducive to good order and discipline. In light of the trend towards joint operations, and in recognition of a greater number of women on active duty in the services, this Department deems necessary the promulgation of a single standard for fraternization.

2. Purpose

a. This policy sets the standard and provides guidance to be used throughout DOD. While this regulation will be considered

definitive, individual services are free to promulgate their own regulations in this area, consistent with this policy.

b. This policy is intended to promote uniformity in the criminal and/or administrative processing of fraternization cases. This regulation applies to all DOD organizations and uniformed personnel, active and reserve. This policy is punitive in nature, and violation of its provisions may subject DOD personnel to action under the UCMJ or other adverse administrative action.

3. DOD Policy on Relationships and Fraternization
Between Servicemembers

a. Fraternization. Fraternization denotes unlawful relationships subject to criminal prosecution under Articles 92, 133 and 134 of the UCMJ. If administrative action is deemed appropriate, it will be accomplished in accordance with applicable service regulations. In the context of this regulation, fraternization refers primarily to mixed-gender relationships, although same gender relationships may also result in fraternization.

Fraternization is any close, personal, non-professional, social relationship between two military uniformed members of DOD, or between a uniformed member and a civilian subordinate, regardless of rank, gender, or service, where the two individuals are in the same chain of command or sphere of influence, and

relate to each other on terms of military equality, disregarding normal considerations of military etiquette, or where the relationship involves or is justifiably perceived to involve partiality, preferential treatment, or abuse of rank or position, and impacts adversely upon good order and discipline.

b. Prohibited Relationships. The following relationships are prohibited and are considered fraternization per se upon proof of the status of each member:

1. drill instructor-recruit
2. trainer-trainee
3. faculty-student
4. instructor-student
5. recruiter-pooler
6. married-single
7. married-married
8. attorney-client
9. doctor-patient
10. chaplain-penitent

The above prohibitions assume a chain of command relationship for numbers 1, 2, 3, 4, and 5. Numbers 6 and 7 pertain to adultery between servicemembers.

c. Additional clarifying definitions:

(1) Relationship--Any association or acquaintance, including marriage, regardless of duty status, geographical location, attire, time, or public or private locale. Relationships imply mutually voluntary conduct.

(2) Chain of command--Chain of command refers specifically to supervisory duties over a subordinate such as a commander to anyone in his command, or an OIC/NCOIC to anyone in his section. This contemplates either direct authority exercised over a subordinate through command, rank, billet, reporting authority (fitness reports, evaluations, proficiency/conduct mark input, etc.), or indirect authority exercised over an individual in a closely related unit, or the succession of supervisors, superior or subordinate, through which command is exercised. This determination is always made from the perspective of the senior member of the relationship. No actual difference in rank is required, however, if one is senior to the other in billet, or duty assignment. This prohibition applies when the junior is in the same chain of command and for one year thereafter.

(3) Sphere of influence--Any instance where the senior member of a relationship actually influences, attempts to influence, or is in a position to influence the assignments,

performance appraisals, promotions, duties, benefits, burdens, or privileges of the junior member of the relationship.

(4) Military equality--Conduct between members in a relationship implying familiarity or undue informality not normally appropriate to the professional relationship of two military personnel of the same ranks in the same circumstance. Thus, dating, cohabitation, vacationing, gambling, and any intimate personal or physical contact is unauthorized between members in the same chain of command.

(5) Justifiable perception--To allege the perception of fraternization, articulable, specific factors giving rise to the perception must be stated short of proof of actual fraternization. Factors to be considered in assessing allegations of such perceptions include the size of the unit, and whether good order, discipline, or morale has been compromised in any direct, tangible, and cognizable fashion. Actual instances of partiality, preferential treatment, or abuse of rank or position assume proof of such conduct. Perceptions are a different matter. Technically, anyone may claim to perceive something amiss in a relationship regardless of the factual basis for such an assertion. The perception alone of these factors is as difficult to prohibit as it is to define.

4. Avoiding the Appearance of Impropriety

a. An important goal of this regulation is to maintain and enhance good order and discipline in the Armed Forces. To that end, utmost professionalism is expected of all personnel at all times. Certain outward manifestations of personal relationships between military personnel are prohibited while on duty or in uniform. These prohibitions include but are not limited to: kissing, touching, hand-holding, hugging, and other actions which typify romance or publicly display affection. This does not prohibit appropriate conduct of this type at occasions of welcome aboard or farewells, where such conduct might be appropriate.

b. Certain customs of the services impact on relationships between couples of significantly disparate rank. To avoid the appearance of impropriety, the following guidance applies where participants in any personal relationship are separated by three or more pay grades or by officer-enlisted status:

(1) Personnel engaged in such a relationship must exercise discretion in the conduct of their affairs. No public displays of affection are authorized on base regardless of duty status or attire--off base displays of affection are limited to areas of privacy where not likely to be seen or heard by other military personnel or civilians, and are strictly prohibited when in uniform.

(2) Assignment policy. Military personnel involved in a relationship not prohibited by this regulation or who are married will not be assigned to the same unit, where they would be in the same chain of command. In dating relationships or engagements, however, it is the duty of the senior member of a relationship to disclose the relationship where it appears imminent that they will be assigned to the same unit. Service detailers and commanders will ensure that personnel involved in such relationships are not placed in the same chain of command.

5. Authorized relationships.

a. Social and/or sexual relationships to include dating and marriage between military personnel are authorized where not specifically prohibited by this regulation.

b. No punitive or adverse judicial, nonjudicial, or administrative action may be taken against personnel involved in relationships not prohibited by this regulation.

6. Guidelines for Imposition of Adverse/Punitive

Sanctions on Personnel Involved in Prohibited Relationships

a. The senior member of a prohibited relationship bears the primary responsibility for the relationship. While both members may be subject to adverse action, the senior member should be held to a higher standard.

b. Commanders will make every reasonable effort to identify and terminate prohibited relationships at an early stage. Resolution of all fraternization cases should occur at the lowest level appropriate to the infraction and consistent with the need to maintain good order and discipline. Commanders are free to choose from the entire spectrum of administrative and judicial sanctions.

7. Continuing Education

Commanders at all levels will ensure continuous education on fraternization and are expected to lead by example. Each service shall ensure that this policy is disseminated and fully understood by all personnel. Programs to ensure continued explanation of the policy will be established.

APPENDIX F
IN THE HOUSE OF REPRESENTATIVES

September 29, 1988

Mrs. Byron submitted the following concurrent resolution; which
was referred to the Committee on Armed Services.

CONCURRENT RESOLUTION

Expressing the sense of the Congress concerning the current
fraternization policies of the Armed Forces of the United
States.

Whereas the current fraternization policies of the Armed
Forces of the United States do not adequately address the
realities inherent in a modern and sexually integrated military;

Whereas there is currently no consistent or uniform
fraternization policy among the different branches of the Armed
Forces governing relationships between members of the Armed
Forces;

Whereas a sound and workable fraternization policy is
necessary to maintain good order, discipline, and high unit morale
within the Armed Forces;

Whereas the fraternization policies of the Armed Forces have been developed over a period of 200 years, during most of which women were not fully integrated into the military;

Whereas any relationship which diminishes, or predictably will diminish, the ability of a superior member to direct the duties of a subordinate member through the exercise of leadership or command is a relationship that is not desired in the Armed Forces;

Whereas the abuse of authority and the appearance of partiality in any form are major sources of impropriety; and

Whereas despite the need for restrictions on improper fraternization, it is unrealistic to expect that close relationships between members of the Armed Forces who hold different ranks will not develop and are in fact desired and required if the United States is to build cohesive units in the Armed Forces:

Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that--

(1) an outright prohibition on fraternization between members of the Armed Forces is not feasible in a sexually integrated military;

(2) the current fraternization policies of the different branches of the Armed Forces of the United States do not adequately address the complex issues presented by the increased presence of women in the Armed Forces; and

(3) the Secretary of Defense should prepare, as soon as practicable, a report on the military fraternization policy of the Armed Forces which makes recommendations to the President and the Congress for changes in the fraternization policy that may be required to maintain a modern military force.

H. Con. Res. 379, September 29, 1988; not passed.

APPENDIX G

Court-Martial and Article 15 Statistics on Fraternization Cases¹

U.S. Air Force
7 November 1990

1. The following is a list of all USAF courts-martial involving officers and the number including fraternization offenses followed by similar lists for officer Article 15 punishments.

a. Year	Total Officer Courts-Martial	Officer Courts with Fraternization Offenses
1987	57	5
1988	44	5
1989	64	8
1990 (YTD)	45	4

b. Year	Total Officer Article 15s	Officer Article 15s w/ Fraternization Offenses
1988	341	10
1989	266	10
1990 (YTD)	201	6

¹These statistics are surprising, based on Colonel Mahoney's observation that in 1981 over 70% of officer misconduct cases involved fraternization. Additionally, he noted that in 1978 the total number of "mixed" marriages totalled 658, while in 1985 it had risen to 975. Mahoney, supra note 77, at 178.

2. As can be seen from the above statistics, the proportion of officer courts-martial with fraternization offenses has ranged between 9 and 14 percent of the total number of officer cases over the past four years. Similarly, the percentage of officer Article 15s involving fraternization has comprised only two to four percent of the nonjudicial punishment actions imposed.

U.S. Marine Corps Fraternization Statistics

FRATERNIZATION OFFENSES
1 APRIL 1982 TO 1 APRIL 1985

TOTAL NUMBER OF CASES: 51

BY GRADE:

LIEUTENANT COLONEL	2
MAJOR	5
CAPTAIN	14
FIRST LIEUTENANT	19
SECOND LIEUTENANT	2
WO/CWO	9

TOTAL 51

DISPOSITION OF CASES:

GCM'S	10
(GCM'S AWARDED DISMISSALS)	(8)
NJP'S	21
ADMIN DISCHARGE BOARDS	18
(ADMIN BDS RECOMMENDING SEPARATION)	(5)
RESIGNATIONS IN LIEU OF TRIAL/ADMIN	15
UOTHC DISCHARGES	7
GENERAL DISCHARGES	6
RESIGNATIONS (HONORABLE)	4

(Note: Disposition totals may be greater than the number of cases because of qualification in more than one disposition category.)

OFFICER DISCIPLINE CASES INVOLVING
FRATERNIZATION OR SEXUAL HARASSMENT

(1 April 1985-26 October 1987)

Summary

Resignations	9 honorable 1 general
Discharge in lieu of court-martial	1 honorable 3 general 2 OTH
Discharge in lieu of administrative separation processing	2 honorable 2 general 1 OTH
General court-martial	3
NJP	13
Administrative separation (Board of Inquiry)	4 general 2 OTH

TOTAL 42

Note: 1. This survey includes only those cases which
resulted in disciplinary action or a
resignation.

FRATERNIZATION OFFENSES
1989

TOTAL NUMBER OF CASES: 12

BY GRADE:

CAPTAIN	3
FIRST LIEUTENANT	5
WO/CWO	4
TOTAL	12

DISPOSITION OF CASES:

GCM	3
(GCM AWARDED DISMISSAL)	(1)
NJP	5
RESIGNATION IN LIEU OF TRIAL/ADMIN BOARD	2
UOTHC DISCHARGE	2
GENERAL DISCHARGE	3
RESIGNATION (HONORABLE)	1

(Note: Disposition totals may be greater than the number of cases because of qualification in more than one disposition category.)

Data compiled by Research and Policy Branch (Code JAR),
Judge Advocate Division, Headquarters, U.S. Marine Corps.

OFFICER FRATERNIZATION CASES, U.S. NAVY

	1987 (NOTE 1)	1988	1989 (NOTE 2)	1990
<u>NUMBER OF CASES</u>	5	9	15	47
MIXED FRAT (NOTE 3)	3	8	11	18
FRAT ONLY	2	1	4	29
MALE	5	8	14	41
FEMALE	0	1	1	6

WHAT RESULTED FROM THE FRATERNIZATION

<u>NONJUDICIAL</u>				
<u>PUNISHMENT (NJP)</u>	5	9	14	47
MIXED FRAT	3	8	10	18
FRAT ONLY	2	1	4	29
MALE	5	8	13	41
FEMALE	0	1	1	6

<u>DETACHED FOR CAUSE</u>				
<u>(DFC)</u>	5	9	15	7
MIXED FRAT	3	8	11	2
FRAT ONLY	2	1	4	5
MALE	5	8	15	6
FEMALE	0	1	0	1

COURTS-MARTIAL (NOTE 4) NO DATA AVAILABLE

<u>ADMINISTRATIVE SEPARATION</u>	11	4	8	13
<u>(NOTE 5)</u>				
MALE	9	2	6	10
FEMALE	2	2	2	3

NOTE (1) DATA PRESENTED IN 1987 AND 1988 WAS GENERATED FROM DFC CASES ONLY. NO DATA ON NJP'S AND ADSEPS WAS AVAILABLE.

NOTE (2) DATA PRESENTED IN 1989 INCLUDES NJP'S AND ADSEPS FROM APRIL 1989 ON. DATA BEFORE THAT DATE WAS NOT AVAILABLE. IN APRIL OF 1989 A REQUIREMENT WAS INSTITUTED TO TRACK FRATERNIZATION CASES.

- NOTE (3) MIXED FRATERNIZATION DATA IS A COMBINATION OF FRATERNIZATION AND OTHER MISCONDUCT (I.E. SEXUAL HARASSMENT, ADULTERY, ETC.)
- NOTE (4) DATA ON COURTS-MARTIAL ARE NOT AVAILABLE DUE TO THE WAY THE OFFICE OF JUDGE ADVOCATE GENERAL (OJAG) FILES THEM. OJAG CURRENTLY PLACES FRATERNIZATION DATA IN A GENERAL FILE ALONG WITH OTHER DATA. OJAG IS UNABLE TO SEPARATE THIS DATA.
- NOTE (5) DATA REFLECTS THE NUMBER OF OFFICERS SEPARATED FOR FRAT ONLY REASONS.

- DATA DOES NOT REFLECT THE NUMBER OF FRATERNIZATION INCIDENTS HANDLED AT COMMAND LEVEL THROUGH COUNSELING AND OTHER NON-PUNITIVE MEASURES. THERE IS NO REQUIREMENT TO REPORT THIS TYPE OF ACTION.

- NO ASSESSMENT CAN BE MADE AT THIS TIME. THE INCREASE IN CASES MIGHT BE THE RESULT OF THE REQUIREMENT TO TRACK FRATERNIZATION AND NOT AN INCREASE IN CASES REPORTED.

U.S. Army Fraternization Statistics

<u>Calendar Year</u>	<u>Article 134</u>	<u>Article 92</u>
1986	13	2
1987	17	2
1988	22	10
1989	22	10
1990 (not full year)	16	7

Note: The statistics provided to the DOD working group are scant. It is impossible to determine whether the cases of fraternization were resolved at the court-martial level or through administrative or nonjudicial means. The Army did note that the Article 92 offenses primarily involved senior NCOs on training installations.

APPENDIX H

U.S. Army Proposal

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Department of Defense Policy on Fraternization

Personal relationships between members of the Armed Forces who are of different grades will be consistent with traditional standards of good order and discipline and the mutual respect that has always existed between members of senior grade and those of lesser grade. Fraternization is defined as a personal relationship which fails to respect differences in rank or grade or which involves, or gives the appearance of, partiality, preferential treatment, favoritism, or use of rank or position for personal gain. This definition includes relationships between officers, between enlisted members, and between members of the same sex as well as those between officers and enlisted members or between male and female members.

The Department of Defense policy is that Service members will avoid engaging in fraternization. Normally, incidents of fraternization should first be addressed by counseling the individuals involved concerning the impropriety or adverse impact of inappropriate conduct. Incidents of fraternization which are contrary to the customs of a Service and which are prejudicial to the good order and discipline of the Armed Forces or are of a

nature to bring discredit upon the Armed Forces may be the basis for disciplinary action under the Uniform Code of Military Justice.

All leaders should effectively communicate to their members the Service policies and regulations regarding inappropriate relationships and fraternization. Periodic instruction and training should supplement previous education and serve to deter potential fraternization offenses from occurring.

I ask your full support to ensure that this policy is disseminated immediately to all members of the Armed Forces.

DOD Proposal

MEMORANDUMS FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Inappropriate Relationships between Service Members of
Different Grades or Ranks

Clear policies on inappropriate relationships between Service members which are understood by our people and consistently enforced are necessary to preserve good order and discipline, build unit cohesion, and accomplish the military mission. The following guidance shall apply to inappropriate relationships within the Department of Defense.

Any conduct or personal relationship that fails to respect differences in grade or rank, and that involves or gives the appearance of partiality, preferential treatment, or use of rank or position for personal gain, is inappropriate. This applies to relationships between officers, enlisted members, or officers and enlisted members, and applies to members of both the same or opposite sex.

Education and leadership by example are the preferred methods for preventing inappropriate relationships. Each Service shall ensure that this policy, and all implementing Service policies, are fully understood by their members. Special emphasis should be given to those serving in positions of leadership and as instructors.

When Service members engage in inappropriate relationships, immediate action must be taken. Normally, commanders or supervisors should initially counsel Service members who engage in inappropriate relationships. However, in more serious cases, or when initial counseling fails to correct the inappropriate behavior, adverse administrative or disciplinary action may be appropriate. Each case must be judged by a commander based on its own merits.

Please review your Service's policies regarding inappropriate relationships between members of different grades or ranks to ensure they are consistent with the policies outlined above. In addition, I ask that you make a special effort to ensure your military members fully understand these policies and that they are consistently enforced.

COMPARISON OF SERVICES' POLICIES (Y-YES/N-NO)

	HAS POLICY/ REGULATION	SPECIFICALLY DEFINES FRATERNIZATION	ADDRESSES PERSONAL RELATIONSHIPS		ADDRESSES OFF-OFF ENL-ENL RELATIONSHIPS	GENDER- NEUTRAL CONCEPT	ADDRESSES MALE/FEMALE RELATIONSHIPS		ADDRESSES ART 134 (FRAT) UCMJ	PROVIDES ADMIN MEASURES COUNSELLING	TRAINING PROVISIONS
			ALL RANKS	RELATIONS			RELATIONS	RELATIONS			
ARMY	REG	N, 1	Y	Y	Y	Y	Y	Y	Y	Y	N
NAVY	POL	Y	Y	Y	Y	Y	Y	Y	N	Y	N, 4
MARINES	MARCOORMAN	N	Y, 2	Y, 3	Y	Y	N	N	N	N	Y
AIR FORCE	REG	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
PERMITS											
			RELATIONSHIPS NOT INVOLVING EXERCISE OF MIL AUTH		ADDRESSES TRAINER/ TRAINEE RELATIONS		ENCOURAGES PROFESSIONAL RELATIONS				
ARMY	N	N	Y	Y	N	Y	Y	Y			
NAVY	N	Y	N, 5	Y	Y	N	Y	Y			
MARINES	N	N	N, 5	N	N	N	Y	Y			
AIR FORCE	N	N	N, 6	Y	Y	N	Y	Y			

NOTES:

- 1 - RELATIONSHIPS BETWEEN OFFICERS AND ENLISTED SOLDIERS ARE PROHIBITED BY CUSTOMS OF THE SERVICE AND MAY CONSTITUTE THE OFFENSE OF FRATERNIZATION UNDER THE PROVISIONS OF ARTICLE 134, UCMJ. REFERS YOU TO MCM.
- 2 - DOES NOT SPECIFICALLY ADDRESS OFFICER-OFFICER RELATIONSHIPS.
- 3 - VERY BROAD DIRECTION.
- 4 - GUIDANCE CONTAINED IN SEPARATE LEADERSHIP ORDER.
- 5 - DOES NOT SPECIFICALLY ADDRESS ISSUE.
- 6 - IMPLIES THAT ANY OFFICER/ENLISTED RELATIONSHIP IS INAPPROPRIATE. OFFICER/OFFICER OR ENLISTED/ENLISTED RELATIONS ARE NOT ADDRESSED IF THEY DON'T IMPACT ON MORALE, DISCIPLINE OR MISSION ACCOMPLISHMENT.

APPENDIX J

Hypotheticals

A. A single Marine captain stationed at Quantico travels on temporary additional duty (TAD) to Camp Pendleton, California. He meets a single, female staff sergeant at Camp Pendleton while shopping at the exchange. He asks her out and has several dates with her that week. They engage in sexual relations. All activity, except for the brief, chance, five minute initial encounter are conducted off base, in mufti. The captain then returns to Quantico and they remain in touch. The Marines in the captain's and the staff sergeant's respective units are not aware of the relationship.

There is no adverse effect on good order and discipline or serious blow to unit morale. The arguments against this type of conduct and any liberalizing of the fraternization policy fall along the following lines.

1. Argument: The staff sergeant's view of officers will be diminished by her personal relationship with the captain.

Response: Who is kidding whom? This rationale assumes that enlisted personnel do not know that officers are human. Even if her view of the "pristine" officer corps is marred, is it likely to perceptibly affect her performance? This is not the same as knowing that married people engage in adultery, for in that instance we have accepted the premise that adultery is illegal, and adulterous conduct is simple to determine. In essence, this common argument is premised upon the social/class distinction which "supposedly" is no longer valid. In fact, it is alive and well and perpetuated by logic such as this.

2. Argument: The staff sergeant could use her relationship with the captain as leverage over the lieutenant she works for.

Response: What type of leverage is this? To use the leverage she would have to begin by making an admission of the prohibited relationship which is adverse to her own interests (assuming the relationship remains prohibited). She would be far more likely to keep quiet with the exception of informing a few close friends. If the relationship was allowed, the staff sergeant could conceivably attempt to have the captain influence the lieutenant, but this would be improper conduct. Even if this relationship were permitted, abuses such as actual attempts at undue influence, would remain unlawful. A far more subtle and insidious potential would be the suggestion to others that she had leverage over her lieutenant due to her relationship with the captain. This is another example of the countless "what ifs" that can be dreamed up in analysis. As long as the focus remains on actual or attempted impropriety, adverse action may be indicated. The leverage issue in this hypothetical, is hardly limited to dating among military personnel. For example, the staff sergeant could conceivably date an influential civilian who could exert far more pressure on her superior than the captain could.

3. Argument: Authorizing mixed gender relationships except within the chain of command will open the door to rampant

fraternization, and will have a devastating impact on good order and discipline.

Response: The honest answer is that a majority of the military services do not truthfully know what will occur until implemented. The experiences of foreign military services and the Army and Coast Guard may be instructive. The odds of a total collapse in discipline are quite remote. As long as the conduct is off-base, out of uniform, and in private, any real or perceived impact becomes extremely difficult to identify and/or quantify. The services need a regulation that incorporates reason and common sense illustrating the drafters' knowledge of the ways of the world. The bottom line is that when you put men and women together, sexual activity is not far behind.

4. Argument: A more liberal fraternization policy will lead to many more officer-enlisted marriages, which are clearly undesirable. At a minimum, they create problems with assignments, use of clubs, and eligibility for base housing.

Response: The fact that "mixed" marriages are undesirable assumes that our current regulation remains in force. Assuming that a more liberal regulation took its place, only prohibiting officer-enlisted relations within the chain of command, then "mixed" marriages are not, by definition, undesirable. The Marine Corps, for example, makes the following cryptic statement on

marriage illustrating the institutional confusion it engenders: "Marriage is fraternization when the conduct between Marines of different grades detracts or tends to detract from the respect due the senior, or is perceived by others to do so." (Discussion Guide at 11.) This statement fails the "straight face" or "common sense" test immediately. Realistically, if any officer-enlisted marriage is not fraternization, then what is? Is the Marine Corps suggesting that sexual intercourse (an acknowledged aspect of marriage) be structured so that the conduct does not detract or tend to detract from the respect due the senior? This represents a policy decision that marriage must be allowed since it would not be politically feasible to forbid it. Therefore, the regulation reflects this contradictory, ambivalent stance through its hair-splitting approach to this issue and its resolution. The message is clear: keep the marriage relationship outside the chain of command, off-base, and out of uniform, and it is reluctantly acceptable. Unfortunately, since everyone knows about the marriage, the word goes out that the key is to keep a "mixed" relationship discreet and then culminate it in a marriage. This is institutionalized hypocrisy in the extreme.

5. Argument: Liberalizing the fraternization regulations poses a classic "slippery slope" dilemma. Once the standards are loosened, there is no end.

Response: It will end exactly where a new regulation says it will end. Even though the regulation would not be as strict, military personnel must still comply with it. By more reasonably restricting the right to associate, one can hopefully attain greater compliance. Unfortunately, full compliance will always be problematic. Other factors press for relaxing the regulations. By liberalizing, yet clarifying, the rule, the military fosters more obedience to the rule, and ultimately, more respect for law. Regardless, more liberal regulations may be forced by simple economics. Due to a lack of on-base housing, most military personnel live and dine at off-base areas without regard to rank. If bases are reduced to single clubs instead of three or four different ones segregated by rank, current regulations will become increasingly difficult to swallow. The same result would be attained if clubs disappeared from bases completely, because military personnel would meet in groups at off-base bars and clubs.

6. Argument: Current regulations require that married couples be kept out of the same chain of command, yet preferably in the same geographic area. By creating countless additional relationships to deal with (more marriages plus authorized dating), the military may be forced to continually react to couples involved in relationships by separating them.

Response: A dating relationship will never acquire the legal status of a marriage. Couples who are dating or engaged would not have the right to be stationed together or even to have the service attempt to do so. By sheer coincidence, should a couple (who is dating) report in to the same unit, the senior member would be required to disclose the relationship and they would have to be separated. Obviously, this would be known in advance and alternate plans could be made. Balancing the minor additional burden on the services against the associational right of constitutional proportions makes the result of the balancing test quite obvious. Ultimately, the way the services deal with marriage threatens the legal sufficiency and stability of the entire fraternization policy. But one thing is certain: institutionally, the military (except the Coast Guard) severely frowns on officer-enlisted marriage, and somewhere along the line both parties pay for the indiscretion. This institutional dynamic is unfair when the regulations do not prohibit marriage.

B. Situation. A Navy lieutenant attached to a ship homeported in San Diego, California, has several dates with a Navy first class petty officer stationed at the Naval Dental Clinic, Naval Station, San Diego. They met at the all-hands club. The dates are uneventful, and involved seeing a movie and having a few drinks. They mutually acknowledge their incompatibility and go

their separate ways. No sexual activity occurred--not even a goodnight kiss. All activity was conducted off-base, in civilian attire. They have never seen each other in uniform.

Discussion. This is a "pure" fraternization case. This type of conduct is undoubtedly common, yet whether acted upon depends (assuming it is discovered) on the outlook of the commander. Under current regulations, if this officer was in the Army or Coast Guard, no actionable offense has been committed. In the Navy and Marine Corps, an offense has been committed, yet it is an example of the type that probably would not reach the appellate court-martial level since there is no real aggravation. The different regulatory policies of the services can produce entirely different outcomes.

The options of this lieutenant's commanding officer are either administrative or punitive. Weaker cases such as this are normally handled administratively through adverse fitness reports, or administrative separation boards. Should this case somehow arrive at a court-martial, it would present an excellent case for jury nullification. A case such as this highlights the lack of a rational basis for the Navy and Marine Corps regulation and is susceptible at trial (by motion) or on appeal, to attack as overbroad, or an unconstitutional infringement to the right of freedom of association. Under the suggested DOD standard, no

adverse action of any kind could be taken against this officer, and if it was, he would have a viable means of redress available.

C. Situation. A Marine Corps captain stationed at Camp Lejeune, North Carolina is home on leave for the holidays in Indianapolis. While there, he meets an Army sergeant. They begin to date, and have sexual intercourse. A romance develops and they continue to see each other on leave. Neither has ever seen the other in uniform or aboard a military installation.

Discussion. This hypothetical is precisely the one which could result in the Marine Corps policy being declared void for vagueness, because it applies only to Marines. This is the type of case handled at low levels, and has not risen to receive judicial review. Thus, NJP or an adverse fitness report would be the most likely means of disposition. Under the suggested DOD regulation, no adverse action of any type could be taken against the captain.

D. Situation. An Army major commands a recruiting station in Portland, Oregon. One of his recruiters is a female corporal. He is responsible for her evaluations and promotions. They begin to date and she is no longer required to work on Saturdays, as are the other recruiters. This actual and perceived favoritism causes morale to deteriorate in the unit.

Discussion. Under virtually all five current regulations and the suggested DOD standard, any adverse action that could be taken for any UCMJ offense may be initiated here. The impact on good order and discipline is clear, and the higher commander is free to take any action deemed appropriate. For an article providing twelve additional hypothetical situations of fraternization, and further discussion, see Johnson, Thou Shalt Not Fraternize! Do We Mean It or Not? USAFA Journ. Prof. Ethics 16-23 (1986).